The

# Madras Law Journal

(The Supreme Court.)

I] JANUARY [1967

## THE SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction)

PRESENT :—P.B. GAJENDRAGADKAR, *Chief Justice*, K.N. WANCHOO, J. C. SHAH, S M SIKRI AND V. RAMASWAMI, JJ.

Yelamanchili Siva Panchaksharamma .. *Appellant**

*v.*

Yelamanchili Chinnabbayi (deceased) thereafter Yellamanchili Basavamma .. *Respondent.*

*Will—Construction—Disposition in favour of a person—Beneficiary if takes as a* persona designata *or by reason of his fulfilling certain legal status—Determination of—Test*

The question whether a disposition of properties contained in a will in favour of a person is as a *persona designata* or by reason of the beneficiary fulfilling a particular legal status is really one of intention of the testator which must be ascertained from the language of the various clauses of the will and the surrounding circumstances of the execution of the will.

Where by his will a testator provided, " my wife (defendant) should take the 2nd son of my elder brother (plaintiff) in adoption .. and after he passes his minority she should deliver" the properties specified in the will to the plaintiff,

*Held,* the intention of the testator, reading the will as a whole, was that the plaintiff should take the properties as an adopted son and therefore, the gift made to the plaintiff was conditional on his being adopted. There was no intention to give the property irrespective of the adoption

Appeal from the Judgment and Decree dated the 16th December, 1958, of the Andhra Pradesh High Court in Appeal Suit No 284 of 1954.

*M. A. Narasayya Chaudhury, I. Shivamurthy* and *K. R. Sharma,* Advocates, for Appellant.

*W.S Barlingay,* Senior Advocate, *E. Udayaratnam,* Advocate, with him, for Respondent.

The Judgment of the Court was delivered by

*Ramaswami, J.*—This appeal is brought on behalf of the defendant against the judgment and decree of the High Court of Andhra Pradesh dated 16th December, 1958, in A S No. 284 of 1954 whereby it reversed the judgment and decree of the Court of Subordinate Judge, Vijayawada in O S No 171 of 1950

In the suit which is the subject-matter of this appeal the plaintiff alleged that he was duly adopted by the defendant—the widow of Lakshmayya—and therefore

*C.A. No. 752 of 1963. 4th February, 1966.

entitled to properties mentioned in Schedules A and B of the plaint The plaintiff also asserted that, apart from his right as an adopted son, he was entitled to the properties claimed as a *persona designata* under the will dated 30th November, 1946—Exhibit B-1 executed by Lakshmayya. The suit was contested by the defendant who alleged that the plaintiff was not adopted as the son of Lakshmayya. The trial Court rejected the case of the plaintiff that he was adopted by the widow after the death of Lakshmayya The trial Court further held that the plaintiff was not entitled to any rights under the will as a *persona designata*. The trial Court accordingly dismissed the suit On appeal by the plaintiff the High Court confirmed the finding that no adoption had been made It, however, held on the construction of the will that the plaintiff was entitled to the properties claimed as a *persona designata* The High Court allowed the appeal and granted a decree to the plaintiff for possession of the properties subject to certain incidental directions given in the decree.

The question presented for determination in this appeal is whether the High Court was right in holding that upon a true construction of the will—Exhibit B-1 there was a gift of the properties to the plaintiff as a *persona designata*.

It is necessary, at this stage, to set out the material provisions of the will — Exhibit B-1 executed by Lakshmayya .—

" I have no male or female issue, I have wife, by name Sivapanchakshari, mother by name Basavamma, and elder brother by name Somaiah For the last 10 days I am suffering from a disease akin to paralysis and fearing that I may not survive, I make the following settlement as set down below to take place after my life

| | | *A. C.* |
|---|---|---|
| Land called Mallukunta | .. | 1—60 |
| Out of Raksh kunta ( ? ) vadde land | .. | 1—25 |
| Out of Maddurivari land | .. | 1—05 |
| Out of pooravarnamvari land | .. | 2—60 |
| TOTAL | .. | 6—50 |

Six acres and (50 fifty cents seri wet land) 10 cents in Kolli Chinna Bapaiah's (back) yard, and 300 yards of house-site towards the west of my house (belonging to my mother-in-law) with a tiled house thereon, have been settled upon my wife to enjoy as she likes with all rights of gift, mortgages exchange, sale, etc.

2 Southern side garden 80 cents (eghty cents of seri wet land) has been settled upon my mother Basavamma to enjoy with all rights of gift, mortgage, exchange, sale, etc.

3. It has been settled that my wife should take, the 2nd son of my elder brother, Yalamanchili Somaiah, in adoption, celebrate his marriage, *etc*, and after he passes his minority she should deliver possession of my other movable and immovable properties that I have and described here below. During the life-time of my wife, if the adopted son and she live together without any trouble, (she) is to live in my house, and if there is disagreement between the adopted son and my wife, (she) is to live in a room of my house.

My wife has been given power over my minor (son's) property, to collect debts due to me and to discharge debts due by me.".

The testator then mentioned two items of debts due to him. He thereafter enumerated the debts due by him which aggregated to Rs 15,803. A description of the land is also given.

The question involved in this appeal is whether the disposition of the properties to the plaintiff is as a *persona designata* or by reason of his fulfilling a particular legal status namely, the adopted son of the testator. The question in such a case is really one of intention of the testator which must be ascertained from the language of the various clauses of the will and the surrounding circumstances of the execution of the will. As pointed out by the Judicial Committee in *Fanindra Deb Raikat* v. *Rajeswar Dass*[1].

" The distinction between what is description only and what is the reason or motive of a gift or bequest may often be very fine, but it is a distinction which must be drawn from a consideration of the language and the surrounding circumstances "

1. (1884) L.R. 12 I.A. 72.

In the present case we are satisfied, on reading the various clauses of the will, that there is no gift to he plaintiff and there was only a direction to the defendant to adopt the plantiff as the son of Lakshmayya and the intention of the testator was that the plaintiff should take as an adopted son and, therefore, the gift made to the plaintiff was conditional on his being adopted The reason is that there are no direct words of disposition in favour of the plaintiff In this connection the language of clause 3 of the will is in contrast with that of clauses 1 and 2 where words of disposition are used with regard to the gifts made to the widow—Shivapanchakshari and to the mother of the testator—Basavamma Clause 3 of the will does not contain any expression of devise of the property in favour of the plaintiff Clause 3 only contains a direction that the wife of the testator should take the plaintiff in adoption, celebrate his marriage etc and "after he passes his minority she should deliver possession of my other movable and immovable properties to him." It is manifest that in the present case there is a direction to the widow to adopt and the gift to the plaintiff is on the condition of his being adopted It appears to us, upon reading the will as a whole, that the testator had no intention to give the property to the plaintiff irrespective of the adoption to be made by the widow in accordance with the direction On behalf of the respondent reference was made to the decision of the Judicial Committee in *Nidhoomoni Debya* v *Saroda Pershad Mookerjee*[1], in which it was held that there was a gift of his property by the testator to a designated person (the words being "I declare that I give my property to Koibullo whom I have adopted"), and this gift was not dependent on the performance of certain ceremonies by his widows The principle of the decision is not applicable to the present case where the language of the testamentary instrument is materially different. We think the present case is similar to that of *Fanindra Deb Raikat* v. *Rajeswar Dass*[2] where the Judicial Committee held on a true construction of the angikar-patra by which the deceased purported to give his property to the respondent by virtue of his being the adopted son, that the gift did not take effect inasmuch as the adoption was invalid. At page 89 of the Report the Judicial Committee observed :

"They think the question is whether the mention of him as an adopted son is merely descriptive of the person to take under the gift, or whether the assumed fact of his adoption is not the reason and motive of the gift, and indeed a condition of it The words are,—'I authorize you by this angikar-patra to offer oblations of water and pinda to me and my ancestors after my death, by virtue of your being my adopted son Moreover, you shall become the proprietor of all the moveable and immoveable properties which I own and which I may leave behind, you shall become entitled to my dena-pawna (debts and dues), and you and your sons and grandsons shall enjoy them agreeably to the customs of the family' He is to make the offerings by virtue of being an adopted son, and 'moreover' he is to become the proprietor This is to be the consequence of the adoption".

For the reasons expressed we hold that the High Court was in error in interpreting the will of Lakshmayya as a gift of the properties made to the plaintiff as a *persona designata* We are, therefore, of the opinion that the plaintiff is not entitled to the properties on the basis of the will executed by Lakshmayya and the suit of the plaintiff should be dismissed This appeal is accordingly allowed with costs.

V.K. *Appeal allowed*

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1. (1876) L.R 3 I A 253

2. (1884) L R 12 I.A 72.

# THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—A. K. SARKAR, M. HIDAYATULLAH, RAGHUBAR DAYAL, J. R. MUDHOLKAR AND R. S. BACHAWAT, JJ.

Atyam Veerraju and others .. *Appellants**

*v.*

Pechetti Venkanna and others .. *Respondents.*

*Landlord and tenant—Tenancy granted by a written instrument or a tenancy whose origin is not known—Question whether the tenancy is permanent—Determination of—Relevant factors.*

*Hindu law—Religious endowment—Lease of lands belonging to deity—Tenancy if intended to be permanent—Considerations—Tenant deliberately withholding the Sanad by which the tenancy was created—Presumption.*

*Evidence Act (I of* 1872), *section* 116—*Limitation Act (IX of* 1908), *section* 28 *and Article* 144—*Tenancy from year to year of lands belonging to a Hindu deity granted by its manager—If terminates with the expiry of office of such manager—Tenant if can, during continuance of the tenancy, acquire absolute title or permanent right of occupancy by prescription*

*Limitation Act (IX of* 1908), *Articles* 134-*B and* 139—*Scope and applicability of Article* 134-*B—Lease from year to year of lands belonging to a Hindu deity lawfully granted by its manager—Succeeding manager terminating tenancy and filing suit for recovery of the lands—Suit if governed by Article* 134-*B or* 139.

Where a tenancy is granted by an instrument in writing, the question whether the tenancy is permanent is a matter of construction, having regard to the terms of the deed, and where the language of the deed is ambiguous, having regard also to the object of the lease, the circumstances under which it was granted and the subsequent conduct of the parties If the origin of the tenancy is not known, the tenant may lead circumstantial evidence to establish his permanent right of occupancy The evidence of long possession coupled with other circumstances such as uniform payment of rent, construction of permanent structures, successive devolutions of property by transfer and inheritance may lead to the inference that the tenancy is permanent The Court may refuse to draw this inference of permanent tenancy at a fixed rent where the demised land belongs to a Hindu religious endowment, for the manger of the endowment has no power to grant such a lease in the absence of legal necessity and the Court will not presume a breach of duty on his part. But the disability of the manager to grant a permanent lease at a fixed rent is not absolute , he may grant such a lease for legal necessity. If by the production of the original grant or by other cogent evidence the tenant establishes the grant of a permanent lease and the validity of the lease comes in question after a long lapse of time when direct evidence of the circumstances under which the grant was made is no longer available, the Court will make every presumption in favour of its validity and may assume that the grant was made for necessity

In the instant case the origin of the tenancy of lands belonging to a deity is known The tenancy was granted by a sanad Whether or not a permanent tenancy was granted is a question of construction of the Sanad Only the Sanad could show what interest was granted by it. The tenants have deliberately withheld the Sanad Therefore every presumtion should be made against them to their disadvantage consistent with facts It must therefore be held that the document if produced would have shown that the tenancy is not permanent Under the circumstances of the case, it must also be held that the Sanad granted a lease of the suit lands belonging to the deity from year to year in consideration of the tenant rendering one-fourth seer of gingelly oil every day to the temple

The manager of a temple or a Hindu deity has no authority to grant a permanent lease of the agricultural lands belonging to the temple or deity without legal necessity and if he grants such a lease it would endure for the term of his office only But he has ample power, in the course of management, to grant a lease from year to year Hence in the case of a lease from year to year of agricultural lands belonging to a temple, granted by its manager, the lease would not terminate with the expiry of the office of such manager or the succeeding managers It will continue of its own force until duly terminated by a succeeding manager The possession by the tenant during the continuance of such a lease, even beyond the life-time of the manager granting the lease, cannot be adverse to the temple. Having regard to section 116 of the Evidence Act (I of 1872), during the continuance of the tenancy a tenant will not be permitted to deny the title of the deity at the beginning of the tenancy It is also well settled that during the continuance of the tenancy, the tenant cannot acquire by prescription a

* C.A. No 452 of 1963. 20th September, 1965.

permanent right of occupancy in derogation of the landlord's title by mere assertion of such a right to the knowledge of the landlord Thus, a tenant from year to year of lands belonging to a deity, cannot by an adverse notice, during the continuance of his tenancy, acquire absolute title to the lands under section 28 read with Article 144 of the Limitation Act (IX of 1908) , nor could he by such notice convert his tenancy into a permanent one

The transfer contemplated by Article 134-B of the Limitation Act (IX of 1908) is an illegal or unauthorised transfer by a previous manager Article 134-B does not apply to a suit for recovery of a property, where the property has been lawfully transferred by a previous manager, and the transfer remains effective after his death resignation or removal Thus, where a lease of lands belonging to a temple granted by its manager is lawful and binding on the temple even beyond his life-time, a suit for recovery of the lands by a succeeding manager after duly terminating the lease by a notice, would not be governed by Article 134-B Such a suit is one by a landlord to recover possession from a tenant and would be governed by Article 139 of the Limitation Act (IX of 1908)

Appeal by Special Leave from the Judgment and Decree dated the 24th March, 1960, of the Andhra Pradesh High Court in Appeal Suit No. 198 of 1957.

*A. V. Viswanatha Sastri*, Senior Advocate (*K. Mangachari* and *T. V. R. Tatachari*, Advocates, with him), for Appellants.

*A. Ranganadham Chetty*, Senior Advocate (*T. Satyanarayana*, Advocate, with him), for Respondents.

The Judgment of the Court was delivered by

*Bachawat, J*—This appeal arises out of a suit instituted by Atyam Veerraju as trustee of Sri Janardhana Swami Varu of Penugonda, a Hindu deity, against Nuli Subba Rao and Pechetti Venkanna for recovery of possession of agricultural Inam lands, R. S. No. 153/3, 2 acres, 38 cents and R. S. No. 167, 4 acres, 36 cents, totalling 6 acres, 74 cents in Cherukuvada Village, West Godavari District, Andhra Pradesh.

The case made in the plaint is as follows The suit lands belong to Sri Janardhana Swami Varu In 1851, one Ponnuri Anandu, the then Archaka and *de facto* trustee of the temple, arranged with Nuli Peda Narasimhulu, the great grandfather of the first defendant, that the latter would supply one-fourth seer of gingelly oil every day to the temple and instead of receiving the price of the oil would enjoy the income of the lands. The arrangement was reduced into writing. The first defendant and his predecessors have been in possession of the lands under this arrangement. The arrangement did not amount to an alienation ; it gave only a licence to receive the income and appropriate it towards the price of the oil. Even if the arrangement amounted to a lease, the plaintiff has a right to put an end to it and to recover the lands. The arrangement was put an end to by notices dated 6th December, 1948 and 31st August, 1949 issued by the plaintiff's Advocate to the first defendant. The second defendant is a lessee of the suit lands under the first defendant.

The defence is as follows The plaintiff is not the trustee of the deity and has no right to sue on its behalf. There was no arrangement as alleged in the plaint. The first defendant is entitled to the suit lands subject only to the burden of supplying one-fourth seer of gingelly oil every day to the temple out of its income. In 1851, there was an arrangement between Peda Narasimhulu, the great grandfather of the first defendant and Ponnuri Anandu, the then Archaka of the temple that Peda Narasimhulu would provide one-fourth seer of gingelly oil every day to the temple out of the income of the suit land. This arrangement was reduced into writing. When this arrangement was made in 1851, Peda Narasimhulu was the owner in possession of the lands. Assuming that he got possession of the lands under the arrangement, Ponnuri Anandu and not the deity was the owner. Assuming that the lands belonged to the deity, the arrangement amounted to a transfer for valuable consideration of a permanent right for possession and enjoyment of the lands in favour of Peda Narasimhulu and his successors-in-interest, reserving for the deity only the right to the supply of the oil. The arrangement is binding on the deity. In any event, Peda Narasimhulu and his successors-in-interest

have been in uninterrupted possession and enjoyment of the lands for over a century and have acquired title to the lands by adverse possession subject only to the burden of supplying the oil. The suit filed a century after the death or termination of office of Ponnuri Anandu is barred by time Pending the suit, the first defendant died, and his legal representatives, the third and fourth defendants, were substituted in his place.

The Subordinate Judge, Eluru negatived the defence contention that the plaintiff is not the trustee of the temple, and this contention is no longer pressed He found that (1) the suit lands belong to the deity, (2) the arrangement of 1851 amounted to a permanent lease of the lands by the then Archaka and *de facto* trustee of the temple to Peda Narasimhulu, on condition of his supplying one-fourth seer of gingelly oil every day to the temple, and (3) the first defendant and his predecessors-in-interest have acquired title to the lands by adverse possession burdened with this condition. On these findings, he dismissed the suit This decree was confirmed by the High Court on appeal. Without expressing any opinion on the first two questions, the High Court agreed with the finding of the trial Court on the question of adverse possession. The plaintiff and two other persons now appeal to this Court by Special Leave.

In this appeal, the following questions arise, (1) Is the deity the owner of the suit lands? (2) If so, what rights were acquired by Peda Narasimhulu under the arrangement of 1851? and (3) Have Peda Narasimhulu and his successors-in-interest acquired title to the lands by adverse possession subject to the burden of supplying one-fourth seer of gingelly oil every day to the deity?

In support of their respective cases, both parties rely on documentary evidence. The documents filed by the plaintiff disclose that in all public records of the village of Cherukuvada, the deity is shown as the inamdar of the suit lands. The Inam Fair Register of Cherukuvada Village (Exhibit A-4) shows that since fasli 1203 corresponding to 1795 one Subnivas Raghoji Pantulu was the inamdar and in 1835, he sold the suit lands to one Murari Venkatarao, who, in his turn, sold the lands in 1851 to Penugonda Sri Janardhana Swami Varu for Rs. 120 By an order of the Inam Commissioner dated 27th October, 1859, the title of the deity as inamdar of the suit lands was confirmed and Title Deed No. 469 was issued to the deity. In the Re-settlement Register of the village prepared in 1932 (Exhbit A-6 also, the deity is shown as the inamdar. In the Inam 'B' Register for the village for fasli 1342 corresponding to 1934, the suit lands are described as *Devadavam*, the deity is shown as the inamdar and the occupation is shown as religious for the purpose of *Deeparadhana* in temple These records do not show that Peda Narasimhulu or his successors-in-interest had any interest in the suit lands. By an order dated 26th October, 1931, the Hindu Religious Endowments Board, Madras framed a scheme for the temple under sections 18 and 57 of the Madras Hindu Religious Endowments Act (II of 1927), in the presence of Nuli Subba Rao, the then successor-in-interest of Peda Narasimhulu. In the schedule to the scheme, the suit lands are shown to be the property of the deity in the possession and enjoyment of Nuli Subba Rao. Subject to certain modifications, which are not material for the purpose of this suit, the scheme was confirmed by a decree of the District Judge, West Godavari on 4th December, 1937, in O.S. No. 30 of 1932.

The documents disclosed by the defendants show that since 1851 Nuli Peda Narasimhulu, his son, Subbarayudu, his grandsons, Sriramulu and Narasimhulu, and his great grandson, Nuli Subba Rao, possessed and enjoyed the suit lands. Exhibit B-1 dated 19th October, 1895, shows a mortgage and lease for six years by Sriramulu and Narasimhulu, Exhibit B-2, dated 7th April, 1902, discloses a mortgage and lease by Sriramulu, Exhibits B-3, B-4, B-5 and B-6 show a mortgage and lease for five years by Sriramulu on 1st March, 1910, and Exhibit B-7, dated 10th March, 1938, and Exhibit B-8, dated 19th August, 1942, are leases of the suit lands for five years and eight years executed by Subba Rao. These documents and particularly Exhibits B-3, B-4 and B-5 recited that the lands were entered in the name of the deity in the village accounts of Cherukuvada and from generation to generation were in the possession and enjoyment of the family of Peda Narasimhulu who got

them under the Sanad dated 10th November, 1851, for purposes of *Nanda Deepam* (evening lighting) of the deity. It is not shown that these documents and the recitals in them were brought to the notice of the temple authorities. These unilateral declarations cannot affect the title of the deity. Moreover, these documents contain admissions that the lands were entered in the village accounts in the name of the deity. By a notice dated 16th June, 1929, the Hindu Religious Endowments Board demanded from Nuli Subba Rao annual contribution for the expenses of the temple. By his reply dated 25th October, 1929, Nuli Subba Rao denied liability for the payment of the contribution and alleged that the lands were granted to his great grandfather, Peda Narasimhulu, by Ponnuri Anandu under the Sanad dated 10th November, 1851, subject to the condition of supplying one-fourth seer of oil every day to the deity, and under the terms of the Sanad, the lands passed to Peda Narasimhulu and the deity is entitled to get only the oil and to no other right. But soon thereafter on notice to Nuli Subba Rao, the Board framed the scheme dated 26th October, 1931, declaring the lands to be the properties of the temple. The documents produced by the defendants do not displace the entries in the Inam Fair Register, the Inam 'B' Register and the Re-survey and Re-settlement Register, which show that the suit lands are *Devadayam*, the deity is the registered inamdar and the pattas were issued to the deity. We are satisfied that the deity is the owner of the lands. We reject the claim of the defendants that in 1851 either Peda Narasimhulu or Ponnuri Anandu was the owner.

We also reject the claim of the defendants that by the Sanad dated 10th November, 1851, the lands were conveyed to Peda Narasimhulu subject to the burden of supplying oil for evening lighting purposes. Had the properties been conveyed by the Sanad to Peda Narasimhulu, he and his successors would have been entered in the village accounts as the inamdars and the pattas in respect of the suit lands would have been issued to them. But all along, the deity is shown as the registered inamdar and the relevant pattas were issued to the deity and not to Peda Narasimhulu or his successors. In spite of a notice served by the plaintiff, the legal representatives of Nuli Subba Rao did not produce the Sanad We are unable to accept their explanation that they are not in possession of the Sanad. They have produced other ancient documents. A perusal of Exhibits B-3 to B-7, A-9 and the written statement shows that up to the date of the filing of the written statement the Sanad was in the possession of the successors of Peda Narasimhulu. We are satisfied that the legal representatives of Nuli Subba Rao are still in possession of the Sanad and that they have deliberately with held it.

We must now examine the claim of the defendants that under the Sanad dated 10th November, 1851, Peda Narasimhulu and his successors-in-interest acquired a right of permanent tenancy. The onus is upon the defendants to establish this claim. Where the tenancy is granted by an instrument in writing, the question whether the tenancy is permanent is a matter of construction, having regard to the terms of the deed, and where the language of the deed is ambiguous, having regard also to the object of the lease, the circumstances under which it was granted and the subsequent conduct of the parties; for an instance, see *Sivayogeswara Cotton Press, Devangere* v. *M. Panchaksharappa*[1]. If the origin of the tenancy is not known, the tenant may lead circumstantial evidence to establish his permanent right of occupancy. The evidence of long possession coupled with other circumstances such as uniform payment of rent, construction of permanent structures, successive devolutions of property by transfer and inheritance may lead to the inference that the tenancy is permanent, see *Bejoy Gopal Mukherji* v. *Pratul Chandra Ghose*[2]. The Court may refuse to draw this inference of a permanent tenancy at a fixed rent where the demised land belongs to a Hindu religious endowment, for the manager of the endowment has no power to grant such a lease in the absence of legal necessity, and the Court will not presume a breach of duty on his part. See *Maharanee Shibissouree Debia* v. *Mothooranath Acharjoo*[3], *Naina Pillai Marakayar* v. *Ramanathan Chettiar*[4]. But the disability of the

1 (1962) 2 S.C.J 85 (1962) 3 S.C.R 876. A.I.R 1962 S.C 413

2 (1953) S.C.J 195. (1953) S.C.R. 930. A.I.R. 1953 S.C. 153.

3. (1869) 13 M.I.A 270, 275

4 (1923) L.R 51 I.A 83, 96-98: (1923) I.L.R. 47 Mad. 337: 46 M.L.J. 546.

manager to grant a permanent lease at a fixed rent is not absolute; he may grant such a lease for legal necessity. If by the production of the original grant or by other cogent evidence the tenant establishes the grant of a permanent lease by him and the validity of the lease comes in question after a long lapse of time when direct evidence of the circumstances under which the grant was made is no longer available, the Court will make every presumption in favour of its validity and may assume that the grant was made for necessity see *Bawa Sitaram* v. *Kasturbbhai Manibhai*[1]. This case was followed in *Mahammad Mazaffar-Al-Musavi* v. *Jabeda Khatun*[2], where similar principles were applied to the case of a Muslim religious endowment.

Now, consider the facts of the present case. The defendants proved that Peda Narasimhulu and his successors-in-interest for four generations have been in continuous and uninterrupted possession of the suit lands for over a century since 1851. They supplied to the temple one-fourth seer of gingelly oil every day for the evening lighting of the temple during all these years. In 1851, the lands were dry, fetching very little income, and it is possible that one-fourth seer of gingelly oil daily was then a reasonable rent. Subsequently, the lands were converted into wet lands, and they are now fetching a large income. In spite of the increase in land and the letting value, the temple authorities made no attempt to raise the rent of the lands or to evict the tenants. From time to time, the tenants created mortgages and leases of the suit lands for short periods. Had the origin of the tenancy been not known, we could from the facts fairly draw the inference that the tenancy was permanent. Having regard to the long lapse of time, we might even have presumed that the permanent tenancy was granted for legal necessity. But in this case, the origin of the tenancy is known. The tenancy was granted by the Sanad dated 10th November, 1851. Whether or not a permanent tenancy was granted is a question of construction of the Sanad. Only the Sanad could show what interest was granted by it. The most striking feature of this case and the thing which tilts the scales against the defendants is the non-production of this Sanad The defendants have deliberately withheld this document. We should, therefore, make every presumption against them to their disadvantage consistent with the facts. We hold that the document, if produced, would have shown that the tenancy is not permanent. The proved facts are consistent with a lease rather than a licence. The manager of the temple in the ordinary course of management had authority to grant leases of the agricultural lands from year to year. Considering all these facts, we hold that the Sanad granted to Peda Narasimhulu a lease of the suit lands from year to year in consideration of his rendering one-fourth seer of gingelly oil every day to the temple.

The next question is whether the suit is barred by limitation and adverse possession. The manager of the temple had no authority to grant a permanent lease of the temple lands at a fixed rent without any legal necessity; and had he granted such a lease, it would have endured for the tenure of his office only. See *Vidya Varuthi Thirtha* v. *Baluswami Ayyar*[3]. But he had ample power in the course of management to grant a lease from year to year. The lease from year to year granted by Ponnuri Anandu in 1851 was, therefore, binding on the temple. This lease did not terminate with the expiry of the office of Ponnuri Anandu or the succeeding managers. It continued of its own force until it was terminated by notice in 1949. The possession of the tenants during the continuance of this lease was not adverse to the temple.

The defendants, however, contend that the possession of Nuli Subba Rao became adverse as from 25th October, 1929 when by a notice (Exhibit A-9) of that date he asserted a hostile title. This notice was addressed to the President, Hindu Religious Endowments Board, Madras. The object of the notice was to deny the liability of Subba Rao to pay any contribution to the Board in respect of the temple. Incidentally, Subba Rao claimed title to the suit lands under the Sanad dated 10th

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1 (1922) L R 49 I A 54 A I R 1922 P C 163

2. (1930) I.L.R. 57 Cal. 1293 (P C) : 58 M L J 641 A I R 1930 P C 103

3 (1921) L R 48 I A 302 I L R 44 Mad. 831 : 41 M.L.J. 346 : A.I.R. 1922 P.C. 123.

November, 1851, subject only to the burden of supplying gingelly oil to the temple daily. This claim was based on the Sanad and ultimately it was a question of construction of the Sanad whether it granted the right claimed by Subba Rao. We have already held that under the Sanad the grantee got a tenancy from year to year only. Moreover, after the service of this notice, the Hindu Religious Endowments Board, Madras framed a scheme in the presence of Nuli Subba Rao declaring that the suit lands belonged to the deity No objection was raised by Nuli Subba Rao to this scheme It is to be noticed also that the trustees of the temple were not served by Nuli Subba Rao with the notice of his claim of absolute right to the suit lands. It is not shown that since 25th October, 1929 Nuli Subba Rao continued to be in possession of the suit lands on the basis of a notorious claim of a hostile title. Having regard to section 116 of the Indian Evidence Act, 1872, during the continuance of the tenancy, a tenant will not be permitted to deny the title of the deity at the beginning of the tenancy. In *Bilas Kunwar* v. *Desraj Ranjit Singh*,[1] the Privy Council observed

> "A tenant who has been let into possession cannot deny his landlord's title, however defective it may be, so long as he has not openly restored possession by surrender to his landlord"

It is also well settled that during the continuance of the tenancy, the tenant cannot acquire by prescription a permanent right of occupancy in derogation of the landlord's title by mere assertion of such a right to the knowledge of the landlord. See *Mohammad Mumtaz Ali Khan* v. *Mohan Singh*[2], *Madhavarao Waman Saundalgekar* v. *Raghunath Venkatesh Deshpande*[3], *Naina Pillai Marakayar* v. *Ramanathan Chettiar*[4]. In the last case, Sir John Edge said :

> "No tenant of lands in India can obtain any right to a permanent tenancy by prescription in them against his landlord from whom he holds the lands"

These decisions received the approval of this Court in *Patna Municipal Corporation* v. *Ram Das*[5]. In the last cited case, this Court refrained from pronouncing upon the soundness of the following observations in *Bastacolla Colliery Co. Ltd.* v. *Bandhu Beldar*[6].

> "There are, however some cases in which a lessee can acquire the right of a permanent right by prescription in spite of payment and acceptance of rent Those are cases where the lessee pays rent on the basis of a notorious claim of permanent tenancy to the knowledge of the owner The acceptance of rent by the owner on the basis of the lessee's claim as a permanent tenant will not prevent the acquisition of such a right by the lessee"

As we did not hear any argument on that point, we do not also decide whether this passage lays down the correct law. This passage must be read with the following observation of the Patna High Court in the same case:

> "If once a tenancy of some kind comes into existence either under an express lease or under a lease implied by law, the tenant cannot convert his tenancy into a permanent one by doing any act adverse to the landlord"

In the instant case, on 25th October, 1929, Nuli Subba Rao was a tenant and by an adverse notice during the continuance of his tenancy he could not acquire absolute title to the suit lands, nor could he convert his tenancy into a permanent one. Moreover, it is not shown that since 1929 Nuli Subba Rao held the suit lands under notorious claim of either an absolute title or a permanent tenancy, or that he supplied oil to the temple on the basis of such a claim.

It follows that during the period from 1851 to 1949 the possession of Peda Narasimhulu and his successors-in-interest was not adverse to the deity. During the period from 1851 to 1929 the title of the deity was not extinguished by adverse possession under section 28 read with Article 144 of the Indian Limitation Act, 1908 (IX of 1908) and the corresponding section 28 and Article 144 of the Indian Limitation Act, 1877 (XV of 1877), section 29 and Article 145 of the Indian

1. (1915) I L R 37 All 557, 567
2. (1923) L R 50 I A 202 : 45 M L J. 623 : A.I.R. 1923 P C 118.
3. (1923) L R. 50 I A. 255 : 47 M.L J 248 : A.I.R. 1923 P.C. 205.
4. (1923) L R 51 I A 83 . I.L R (1923) 47 Mad 337 46 M L J 546
5. C A No 598 of 1963 decided on 11th August, 1965.
6. A.I.R. 1960 Patna 344.

Limitation Act, 1871 (IX of 1871) and section I clause 12 of the Indian Limitation Act, 1859 (XIV of 1859). Nor was the title of the deity extinguished during the period from 1929 to 1949 by the operation of section 28 read with Article 134-B introduced in the Indian Limitation Act, 1908 by the Limitation (Amendment) Act (I of 1929) In our opinion, the transfer contemplated by Article 134-B is an illegal or unauthorised transfer by a previous manager. Article 134-B does not apply to a suit for recovery of a property, where the property has been lawfully transferred by a previous manager, and the transfer remains effective after his death, resignation or removal. The lease of 1851 by the previous manager was lawful and binding on the temple, and continued of its own force until 1949. Consequently, Article 134-B has no application to the present suit. The suit is one by a landlord to recover possession from a tenant and is governed by Article 139. The tenancy was determined in 1949, and the suit being instituted on 1st November, 1954, is well within time. The contention that Peda Narasimhulu and his successors-in-interest acquired title to the suit lands by prescription and the suit is barred by limitation is, therefore, rejected.

The validity of the notice terminating the tenancy is not disputed. The plaintiff is, therefore, entitled to recover the suit lands.

In the result, the appeal is allowed, the judgment and decree of the Courts below are set aside. There will be a decree in favour of the trustees of the temple for possession of the properties mentioned in the schedule to the plaint. The trial Court is directed to enquire into the mesne profits and to pass an appropriate decree for the same in accordance with law. There will be no order as to costs in this Court and in the Courts below.

V K *Appeal allowed.*

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THE SUPREME COURT OF INDIA.
(Civil Appellate Jurisdiction )

PRESENT —K. SUBBA RAO, K. N. WANCHOO, J. C. SHAH, S. M SIKRI AND V. RAMASWAMI, JJ.

N. K. Mohd. Sulaiman Sahib .. *Appellant**

*v.*

N. C. Mohd. Ismail Saheb and others . *Respondents.*

*Legal Representatives—Representation—Decree properly obtained against some only of legal representatives —Binding nature on heirs not impleaded—Death of debtor after suit—Suit against legal representatives—Continuation or institution of suit after diligent and* bona fide *enquiry against some only of the legalrepre sentatives of deceased debtor—Heirs not impleaded, bound by the decree—Existence of fraud, collusion or other vitiating factors, and special defence open to the non-impleaded heir—Open to investigation by Court—Binding nature of decree—Question depends not on personal law but on law of procedure—Practice*

*Civil Procedure Code (V of 1908), section 2 (16), Order 22, rule 4—Suit and decree against some of the legal representatives—How for binding on the others not impleaded*

After the death of the mortgagor, a Mohamedan, the mortgagee after a *bona fide* enquiry, instituted the suit on the mortgage against the three widows and a daughter of the deceased mortgagor, as his heirs, and obtained a decree against them and purchased the property in execution of the final decree for sale The present suit was instituted by the son of the deceased mortgagor, for partition and in the alternative for a declaration that he is entitled to redeem the property as in the prior suit he was not impleaded as an heir and the decree is not binding on him On the dismissal of the suit by the trial Court as confirmed by the High Court, the plaintiff appealed,

*Held,* the decree in the prior suit instituted by the mortgagee after full and *bona fide* enquiry, will be binding upon the plaintiff

A creditor of a Muslim dying intestate may sue all the heirs of the deceased and where the estate of the deceased has not been distributed between the heirs he may execute the decree against the property as a whole without regard to the extent of the liability of the heirs *inter se*

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* C.A. No. 432 of 1963. 23rd September, 1965.

Where the debtor in an action dies after institution of the suit, the creditor after diligent and *bona fide* enquiry impleads some but not all the heirs as legal representatives, the heirs so impleaded would represent the estate of the deceased and a decree obtained against them binds not only those heirs who are impleaded in the action but the entire estate including the interest of those not brought on the record

The same principle applies to the case where the creditor files a suit against the heirs themselves after the death of the debtor If the suit was instituted after diligent and *bona fide* enquiry, the decree obtained against some only of the heirs would be equally binding upon the other heirs not impleaded.

The Court, will undoubtedly investigate, if invited, whether the decree was obtained by fraud, collusion or other means intended to overreach the Court The Court will also enquire whether there was a real contest in the suit and may for that purpose ascertain whether there was any special defence which the absent defendant could put forward, but which was not put forward

Whether a decree obtained by a creditor against the heirs of a deceased Muslim is binding upon the entire estate or only some of those who were impleaded *eo nomine* is not a question to be determined on the personal law either of the deceased or of the defendant in the suit It is a part of the law of procedure which regulates all matters going to the remedy, and when the matter passes into the domain of procedure, it must be regulated by the law governing the action of the Court

Appeal from the Judgment and Decree dated the 27th August, 1958, of Andhra Pradesh High Court in Appeal Suit No. 113 of 1954**

*C. Narasimhacharyya* and *K R Chaudhury*, Advocates, for Appellant.

*P. Ram Reddy*, Advocate, for Respondents Nos. 4 to 7.

*P. Ram Reddy* and *A V. V Nair*, Advocates, for Respondents Nos. 15, 16, 18 to 20, 22 and 23 to 25.

The Judgment of the Court was delivered by

*Shah, J*—Khader Miran, Muhammad Abdul Kassim and Muhammad Labhai mortgaged on 21st August, 1933, certain immoveable property in favour of Narsimha Reddy to secure repayment of Rs. 20,000. Khader Miran died on 19th November, 1937. On 12th July, 1940. Narsimha Reddy commenced an action for enforcement of the mortgage against Muhammad Abdul Kasim, Muhammad Labhai, and three widows of Khader Miran—Fathima Bi, Amina Bi and Mahaboob Bi, and a daughter Muhammad Mariyam Bi. A preliminary mortgage decree passed in the action on 25th November, 1940 was made absolute on 11th October, 1941, and in execution of the decree the properties mortgaged were sold at a Court auction and were purchased by the mortgagee Narsimha Reddy on 16th October, 1942, with leave of the Court. Narsimha Reddy thereafter transferred the properties to P. Chinnamma Reddi and the latter in his turn alienated portions thereof.

N. K. Mohammad Sulaiman—hereinafter referred to as 'the plaintiff'—claiming that he was the son of Khader Miran instituted Suit No. 125 of 1950 in the Court of the Subordinate Judge, Chittoor for a decree for partition of the mortgaged properties "by metes and bounds" and in the alternative for a declaration that he was entitled "to redeem the mortgage or portion thereof equal to his share in the mortgaged properties" and for an order against Narsimha Reddy and the alienees from him to render a true and correct account of the income of the properties, and for a further declaration that the decree and judgment in Suit No. 87 of 1940 and the execution proceedings thereon were null and void, and "if necessary to set aside the same." To this suit were impleaded Mohammad Ismail who, it was claimed, was also the son of Khader Miran, and was not impleaded in the earlier suit, Mahaboob Bi the mother of the plaintiff, Mariyam Bi his step sister, Narsimha Reddy and twenty-two alienees of the property. The suit was resisted by Narsimha Reddy and the alienees on two principal grounds—that the plaintiff was not the son of Khader Miran, and that the decree in Suit No. 87 of 1940 was in any event binding upon the plaintiff for the estate of Khader Miran was fully represented in the suit by those who were in possession of the estate of Khader Miran. On the second plea, it was submitted that Narsimha Reddy had made "full and *bona fide*

** (1959) 1 An W R 220

inquiry " and had come to learn that only the three widows and daughter of Khader Miran were the surviving members of the family of Khader Miran and that they were in possession of his estate, and that it was not brought to the notice of Narsimha Reddy at any time that there were, beside those impleaded, other heirs to the estate of Khader Miran.

The Trial Court held that the plaintiff who was the son of Khader Miran was " sufficiently represented " by the three widows and the daughter of Khader Miran in Suit No. 87 of 1940, and that the plaintiff and his brother Mohammed Ismail were bound by the decree and the sale in execution thereof even though they were not impleaded as parties *eo nomine*. In appeal to the High Court of Andhra Pradesh, the decree passed by the Trial Court, dismissing the plaintiff's suit, was confirmed. With certificate granted by the High Court, this appeal is preferred *in forma pauperis* by the plaintiff.

The Trial Court and the High Court have held that Narsimha Reddy had instituted the mortgage suit after making *bona fide* enquiry and being satisfied that the only heirs of Khader Miran were his three widows and his daughter, and that the entire estate was in their possession, and that there were no other heirs. This finding is not challenged before us, but Counsel for the plaintiff argues that when in a suit to enforce a mortgage instituted after the death of a Muslim debtor one or more out of the heirs of the deceased debtor is or are not impleaded in the suit and a decree is obtained, what passes to the auction-purchaser at the Court sale is only the right, title and interest in the properties of the heirs of the deceased debtor who were impleaded in the suit. On this question, there has been a sharp conflict of opinion amongst the High Courts in India.

It is necessary in the first instance to set out certain principles which are accepted as well settled. The estate of a Muslim dying intestate devolves under the Islamic law upon his heirs at the moment of his death *i.e.*, the estate vests immediately in each heir in proportion to the shares ordained by the personal law and the interest of each heir is separate and distinct Each heir is under the personal law liable to satisfy the debts of the deceased only to the extent of the share of the debt proportionate to his share in the estate A creditor of a Muslim dying intestate may sue all the heirs of the deceased and where the estate of the deceased has not been distributed between the heirs he may execute the decree against the property as a whole without regard to the extent of the liability of the heirs *inter se* The creditor is however not bound to sue all the heirs ; the creditor may sue some only of the heirs and obtain a decree against those heirs, and liability for satisfaction of the decree may be enforced against individual heirs in the property held by them proportionate to their share in the estate It is also settled that where the defendant in an action dies after institution of the suit, the creditor after diligent and *bona fide* enquiry impleads some but not all the heirs as legal representatives, the heirs so impleaded represent the estate of the deceased and a decree obtained against them binds not only those heirs who are impleaded in the action but the entire estate including the interest of those not brought on the record ; *Daya Ram and others* v *Shyam Sundari and others*[1]. This Court at page 1054 observed ·

" The almost universal consensus of opinion of all the High Courts is that where a plaintiff or an appellant after diligent and *bona fide* enquiry ascertains who the legal representatives of a deceased defendant or respondent are and brings them on record within the time limited by law, there is no abatement of the suit or appeal, that the impleaded legal representatives sufficiently represent the estate of the deceased and that a decision obtained with them on record will bind not merely those impleaded but the entire estate including those not brought on record "

This Court has therefore recognised the principle of representation of the estate by some heirs where the defendant dies during the pendency of a suit to enforce a claim against him, and not all the heirs are brought on the record. If after *bona fide* enquiry, some but not all the heirs of a deceased defendant are brought on the record, the heirs so brought on the record represent the entire estate of the deceased, and the decision of the Court in the absence of fraud or collusion binds those who are not brought on the record as well as those who are impleaded *eo nomine*. *Daya*

1. (1966) 1 S C J. 6 A.I R. 1965 S C. 1049.

*Ram's case*[1], it is true, did not relate to the estate of a deceased Muslim, but the rule enunciated is of the domain of procedural law and applies to all communities irrespective of the religious pursuasion or personal law. Counsel for the plaintiff says that this rule applies only to cases where the defendant dies after institution of the suit, and does not apply where a suit is instituted against the heirs of a deceased debtor. The reason suggested is that by the combined operation of Order 22, rules 4 and 5, Code of Civil Procedure, there is a decision of the Court that persons impleaded are the heirs of the deceased and are allowed to be brought on the record as his heirs and legal representatives. Reliance is also placed upon the definition of "legal representative" in section 2 (11) of the Code of Civil Procedure. It is submitted that where persons are either expressly or by implication directed or permitted by an order of the Court to represent the estate, in the absence of fraud or collusion the heirs brought on the record will represent the entire estate, and the decree passed against them and proceedings taken pursuant thereto will be binding upon the heirs not so impleaded. But where the plaintiff institutes a suit against certain persons as legal representatives of the deceased debtor there is no representation to the estate by some only of the heirs of the deceased where the deceased was a Muslim. On this point there has been, as already stated, conflict of opinion and in some High Courts from time to time different views have been expressed. To seek elucidation of principle from an analysis of the numerous decisions of the cases may turn out a futile pursuit. That is not because we do not hold the opinions expressed by eminent Judges on this question in great respect, but because in our view it would conduce to greater clarity if the grounds on which the decisions have proceeded are examined in the light of the true principles applicable.

In seeking its solution the problem whether a decree obtained by a creditor in a suit instituted against some of the heirs of a deceased Muslim for payment of debts due by him is binding on the other heirs has been approached from different angles : (*i*) by the analogy of Hindu law where on devolution of property on death of a Hindu upon members of a joint Hindu family or a widow the estate of the deceased is represented by the manager or the widow, and the creditor in a suit properly instituted against the manager or the widow may obtain a decree which binds all the persons having interest in the estate ; (*ii*) the rule of Mahomedan law as set out in Hamilton's Hedaya, 2nd Edition, page 349, Book 20, Chapter 4 (relating to the duties of the Kazee)

> " for anyone of the heirs of a deceased person stands as litigant on behalf of all the others, with respect to anything due to or by the deceased, whether it be debt or substance, since the decree of the Kazi in such case is in reality either in favour of or against the deceased , and any of the heirs may stand as his representative with respect to such decree* * * *. "

To this it is objected.

> " If one heir be litigant on behalf of the others, it would follow that each creditor is entitled to have recourse to him for payment of his demand, whereas, according to law, each is only obliged to pay his own share "

Reply :

> " The creditors are entitled to have recourse to one of several heirs only in a case where all the effects are in the hands of that heir This is what is stated in the Jama Kabeer , and the reason of it is that although any one of the heirs may act as plaintiff in a cause on behalf of the others, yet he cannot act as defendant on their behalf, unless the whole of the effects be in his possession "

(*iii*) that a creditor of the deceased may sue one of the heirs who is in possession of the whole or any part of the estate, without joining other heirs as defendants, for administration of the estate and for recovery of the entire debt, and get a decree against the entire estate , and (*iv*) on the strict rules of Islamic law that devolution of inheritance takes place immediately upon the death of the ancestor, and *jus representationis* being foreign to the Islamic law of inheritance, only those heirs who are sued by the creditor of the deceased ancestor are liable to satisfy the debt proportionate to their interest in the estate.

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1. (1966) 1 S C J 6 . A.I R. 1965 S C. 1049.

The first view was enunciated by the Calcutta High Court in *Mussamut Nuzeerun* v. *Moulvi Amerooddin*[1], and was adopted by the Bombay High Court in *Khurshetbibi* v. *Kesho Vinayaka*[2], *Davalava* v. *Bhimaji*[3], and *Virchand* v. *Kondu*[4].

The Second view though pressed for acceptance before the Courts has not met with approval. The rules of procedure enunciated by the Muhammadan lawyers have no application under the Indian system of jurisprudence to the trial of actions in our Courts and as observed by Mahmood, J., in *Jafri Begam* v *Amir Muhammad Khan*[5], at page 842 :

> " * * * * and if there are any claims against the estate, and they are litigated, the matter passes into the region of procedure, and must be regulated according to the law which governs the action of the Court The plaintiff must go to the Court having jurisdiction, and institute his suit within limitation, impleading all the heirs against whose shares he seeks to enforce his claim "

The Calcutta High Court in *Muttyjan* v. *Ahmed Ally*[6], accepted the third view and regarded a suit filed by a creditor to recover a debt due from the estate of a deceased Muslim debtor as an administration-action. It was further confirmed in *Amir Dulhin* v. *Baij Nath Singh*[7]. On this rule an exception was engrafted in a later judgment in *Abbas Naskar* v. *Chairman, District Board, 24-Parganas*[8] It was observed in *Abbas Naskar's case*[8], that in the case of an estate of a Muslim dying intestate if there has been no distribution of the estate, and the suit is instituted for recovery of a debt the creditor may sue any heir in possession of the whole or part of the estate without joining the other heirs as defendants, for realisation of the entire debt and a decree passed in such a suit may be enforceable against all the assets that are in his possession. But a decree for administration may only be passed where the heirs who are sued are in possession of the whole or any part of the estate so as to be liable to account for the same to the rest, or in other words, the suits were against some of the heirs, who are in possession of property exceeding their share of the inheritance , where the heirs are in possession of the respective shares of inheritance, that principle can have no application. The modified rule accepted by the Calcutta High Court is that where an heir is in possession of the estate of a deceased Muslim on behalf of the other heirs, in a suit to recover a debt due from the estate a decree for administration may be passed.

The last view has been uniformly expressed by the Allahabad High Court since it was first enunciated by Mahmood, J., in *Jafri Begam's case*[5] It may be observed that the Bombay High Court in later decisions has accepted this view · *Bhagirthibai* v. *Roshanbi*[9] , *Shahasaheb* v. *Sadashiv*[10], *Lala Miya* v *Mamubibi*[11], and *Veerbhadrappa Shilwant* v. *Shekabai*[12].

We may now examine whether the grounds on which the different views were expressed are sustainable in principle.

It must be recalled that whether a decree obtained by a creditor against the heirs of a deceased Muslim is binding upon the entire estate or only of those who were impleaded *eo nomine* is not a question to be determined on the personal law either of the deceased or of the defendant in the suit. It is a part of the law of procedure which regulates all matters going to the remedy, and when the matter passes into the domain of procedure, it must be regulated by the law governing the action of the Court.

An administration-action may undoubtedly lie at the instance of a creditor for and on behalf of all the creditors for an order that the Court do enter upon administration of the estate and do pay to the creditors claiming the amount either

1. 24 W R 3
2 (1887) I L R 12 Bom 101
3 (1895) I L R 20 Bom 338
4 (1915) 17 Bom L R 685 I L R (1915) 39 Bom 729
5 (1885) I L R 7 All 822
6 (1882) I L R 8 Cal 370
7. (1894) I L R. 21 Cal 311
8. (1931) I.L R 59 Cal. 691.
9 (1918) I L R 43 Bom 412 21 Bom L R 329
10 (1918) I L R 43 Bom 575 21 Bom L R 369
11 (1923) I L R 47 Bom 712 A I R 1923 Bom 411
12 I L R (1939) Bom 232 . A I R 193 Bom 188.

the whole or such amount may be rateably payable to each creditor out of the estate after satisfying the primary liabilities of the estate. A suit by a creditor may in appropriate cases, where the procedure prescribed in that behalf is followed, be treated as an administration-action, but every action instituted by a creditor of a deceased debtor to recover a debt due out of his estate in the hands of some or all the heirs is not an administration-action. A person in possession of the whole or a part of the estate which originally belonged to a debtor dying intestate does not clothe himself with a right to represent other persons who are interested in the estate. Such person may by intermeddling with the estate be regarded as executor *de son-tort* and may render himself liable accordingly, but thereby he cannot represent those whose estate he has intermeddled with. An administrator appointed by the Court would represent the estate, and a creditor may sue him for recovery of the debts due out of the estate In an administration-action properly instituted, the Court may take upon itself the duty to administer the estate out of which the debts may be satisfied But a simple action for recovery of a debt from the estate of a deceased debtor will not be regarded as an action for administration.

Ordinarily the Court does not regard a decree as binding upon a person who was not impleaded *eo nomine* in the action. But to that rule there are certain recognised exceptions, where by the personal law governing the absent heir the heir impleaded represents his interest in the estate of the deceased. There is yet another exception which is evolved in the larger interest of administration of justice. If there be a debt justly due and no prejudice is shown to the absent heir, the decree in an action where the plaintiff has after *bona fide* enquiry impleaded all the heirs known to him will ordinarily be held binding upon all persons interested in the estate. The Court will undoubtedly investigate, if invited, whether the decree was obtained by fraud, collusion or other means intended to overreach the Court. The Court will also enquire whether there was a real contest in the suit, and may for that purpose ascertain whether there was any special defence which the absent defendant could put forward, but which was not put forward Where however, on account of *bona fide* error, the plaintiff seeking relief institutes his suit against a person who is not representing the estate of a deceased person against whom the plaintiff has a claim either at all or even partially, in the absence of fraud or collusion or other ground which taint the decree, a decree passed against the persons impleaded as heirs binds the estate, even though other persons interested in the estate are not brought on the record This principle applies to all parties irrespective of their religious persuasion.

A few illustrative cases which support this principle may be noticed. In *Chaturbujadoss Kushaldoss and Sons* v. *Rajamanicka Mudali*[1], a debtor died leaving a will bequeathing his estate to his nephew subject to certain dispositions. In ignorance of the will, and *bona fide* believing that the widow was the proper legal representative, a creditor of the deceased brought a suit against her alone and obtained a decree *ex parte* for satisfaction of the debt out of the husband's estate and satisfied his claim by sale of certain items of the estate in her hands. A nephew of the deceased who was a devisee under the will sued to set aside the decree and sale in execution thereof. It was held by the High Court of Madras that as the creditor *bona fide* believed that the widow was the proper legal representative and as she was then interested in defending the estate and sufficiently represented the estate and as the creditor got his decree without any fraud or collusion with her, it was binding on the nephew who was the residuary legatee under the will. In dealing with this question, Madhavan Nair, J , observed at page 218 :

> "*Prima facie*, a decree will bind only the parties to it or those claiming through them , but there are exceptions to this rule The Courts have held that in certain circumstances when one who is not the true legal representative of a deceased person is impleaded as his legal representative, then a decree passed against him in his character as the legal representative of the deceased would be binding on the true representative though he is not a party to it The suit may have been instituted against the wrong legal representative at the very commencement or the wrong legal representative may have been brought on record during the pendency of the suit or after the decree and for purposes of execution "

1. (1930) I.L.R 54 Mad. 212 . 60 M.L.J. 97 : A.I.R. 1930 Mad. 930.

The principle so stated derives support from the judgment of the Judicial Committee in *Khairajmal* v. *Daim*[1]. In that case, the material facts out of the many complicated facts which have a bearing on the point under review are these ; a suit was instituted for redemption of two mortgages of 1874 in respect of certain immovable properties. The plea of the mortgagee in substance was that the equity of redemption had been sold in execution of money decrees against the mortgagors in earlier proceedings and was vested in other persons, and therefore, the mortgagors had no right to sue. One of such mortgagors was Nabibaksh. It appeared that in Suit No. 372 of 1879 instituted for recovery of a debt there was reference to arbitration, and Nabibaksh signed the reference Nabibaksh died shortly thereafter and his two widows and his son Muhammad Hasan named as legal representatives were served with the summons and were willing to accept the award. They were also served with the notice of sale of the property of Nabibaksh. An infant daughter of Nabibaksh was omitted from the list of heirs impleaded, but the entire interest of Nabibaksh was sold in execution of the decree obtained in that suit. The Judicial Committee held that the estate of Nabibaksh was sufficiently represented for the purpose of the suit, although the name of the infant daughter was omitted and that the share of Nabibaksh in the equity of redemption in the property sold in execution of the decree in Suit No. 372 of 1879 being bound by the sale, was irredeemable. It is true that Nabibaksh died after the suit for recovery of the debt was instituted and his heirs were brought on the record under a procedure similar to Order 22, rule 4 of the Code of Civil Procedure. But the Judicial Committee did not express the view that the estate was represented because the heirs were brought on record after the death of Nabibaksh in a pending suit, but apparently on the principle on which the Madras High Court in *Chaturbujadoss Kushaldoss and Sons' case*[2], proceeded This view was also expressed by the High Court of Orissa in *Sarat Chandra Deb and others* v. *Bichitrananda Sahu and others*[3], where Jagannadha Das, J , observed that where proceedings taken *bona fide* by the creditor against the person actually in possession by virtue of the assertion of a claim to succeed to or represent the estate of the deceased debtor are binding against the real legal heir, whether such proceedings were commenced or continued against the wrong person and irrespective of any express or implied decision by the Court that the person so impleaded was the proper legal representative. The Court in that case recognised that though the title of a person to property cannot normally be affected by any proceeding to which he is not a party, his interest in the property may still be bound if he may, having regard to the circumstances, be said to have been sufficiently represented in the proceeding. The learned Judge observed at page 445 ·

" I have, therefore, no hesitation in coming to the conclusion that where a mortgagee institutes a suit *bona fide* against the person in possession of the estate of the deceased mortgagor, who is in such possession in assertion of a claim to succeed to that estate, and where a person purchases the mortgaged property *bona fide* in execution of that decree, such purchaser gets the full title to the mortgaged property by virtue of such sale and the real heir is bound thereby and that his only remedy, if at all, in a proper case is to get the sale set aside by appropriate proceedings in time "

In a recent judgment of the Madras High Court in *Shunmugham Chettiar* v. *K. A. Govindasami Chettiar and others*[4] it was held that where after the death of the mortgagor, in a suit on the mortgage, the mortgagee *bona fide* and " after due care and caution " impleads a person who is believed by him to be the legal representative of the mortgagor and who is in possession of the mortgaged property and a decree is obtained on that footing without the legal representative so impleaded disclaiming any liability, the decree thus obtained by the mortgagee will bind other legal representatives who may be in existence.

It is true that the cases of the Madras and Orissa High Courts did not relate to the estate of a Muslim debtor. But the rule, as already stated, is one of procedure and not of personal law, and applies to a Muslim debtor's estate as well as to a Hindu debtor's estate. It is true that in the case of a debtor who is sued for recovery of the debt, and if he died after the institution of the suit, there is some order of the

1. (1904) L.R. 32 I.A. 23 (P.C) : I.L.R. 32 Cal. 296.
2. (1930) I.L.R. 54 Mad 212 . Com L.J. 97 : AIR 1930 Mad 930
3. I L R. (1950) Cut 413
4. A.I.R. (1961) Mad. 428.

Court—express or implied—recognising that the person sought to be brought on record are the heirs and legal representatives of the deceased debtor. The Court records a conclusion, if not expressly by implication, that they represent the estate. It was held by this Court, as already stated earlier, in a recent judgment in *Daya Ram's case*[1], that failure to bring the other heirs on record, if there is a *bona fide* enquiry as to the existence of the heirs, does not affect the validity of the decree and the proceedings taken thereunder. In a suit instituted against the heirs of a deceased debtor, it is the creditor who takes upon himself the responsibility to bring certain persons as heirs and legal representatives of the deceased on the record. If he has proceeded *bona fide* and after due enquiry and under a belief that the persons who are brought on the record are the only legal representatives, it would make no difference in principle that in the former case the heirs have been brought on the record during the pendency of the suit, the creditor having died since the institution of the suit, and in the other at the instance of the plaintiff certain persons are impleaded as legal representatives of the deceased person. In either case, where after due enquiry certain persons are impleaded after diligent and *bona fide* enquiry in the genuine belief than they are the only persons interested in the estate, the whole estate of the deceased will be duly represented by those persons who are brought on the record or impleaded, and the decree will be binding upon the entire estate. This rule will of course not apply to cases where there has been fraud or collusion between the creditor and the heir impleaded or where there are other circumstances which indicate that there has not been a fair or real trial, or that the absent heir had a special defence which was not and could not be tried in the earlier proceeding.

The appellant and his brother Mohammad Ismail were both minors when the action for enforcement of the mortgage in favour of Narsimha Reddy was instituted The mortgaged property was in the possession of the three widows and a daughter of Khader Miran, and the other mortgagors. It is also found that Narsimha Reddy had made *bona fide* enquiry and had not come to learn about the existence of any other heirs. It is also not the case of the appellant that he had any special defence to the suit which if he was impleaded as a party to the suit he could have set up, nor is there any ground for holding that there was no fair or real trial of the action.

This appeal therefore fails and is dismissed with costs. The appellant was permitted to appeal *in forma pauperis*. He will pay the Court-fee payable on the memo. of appeal as if he had not been permitted to appeal *in forma pauperis*.

V.S. —— *Appeal dismissed.*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P B GAJENDRAGADKAR, *Chief Justice*, K N. WANCHOO, M. HIDAYATULLAH, V RAMASWAMI AND P SATYANARAYANA RAJU, JJ

Cumbum Roadways (P ) Ltd , Madurai and others .. *Appellants**

*v*

Somu Transport (P ) Ltd , and others .. *Respondents.*

P. N Swami Naidu & Co., and another .. *Interveners.*

*Constitution of India* (1950), *Article* 226—*Motor Vehicles Act* (*IV of* 1939)—*Government Order No.* 1298 *is sued by the Government of Madras relied on by an applicant for stage carriage permit before* Regional Transport Authority—*Said Government Order struck down by Supreme Court during pendency of further proceedings—Applicant if barred from contending in such proceedings that the Government Order is bad—Writ proceedings against order of the State Transport Appellate Tribunal made in appeal—High Court deciding to remand the case—Remand if should be to original or appellate authority—Parties entitled to be heard in such remand*

The fact that the Government Order No 1298 issued by the Government of Madras under section 43-A as introduced by the Madras Amending Act (XX of 1948), in the Motor Vehicles Act

1. (1966) 1 S.C.J 6. : A.I.R. (1965) S C. 1049.

*C.As. Nos 907 of 1964 and 150 and 363 of 1965. 10th December, 1965

(IV of 1939) was relied on by an applicant for the stage carriage permit before the Regional Transport Authority will not debar such applicant from contending at a later stage, (in further proceedings arising from the order of the Regional Transport Authority during the pendency of which the said Government Order was struck down by the Supreme Court as invalid), that the Government Order was bad Before the decision of the Supreme Court striking down the Government Order, it had always been relied upon by applicants for permits That would be no reason for holding that they were barred from contending that the Order was bad after it was struck down.

Where an order passed by the State Transport Appellate Tribunal in appeal from an order of the Reginal Transport Authority granting permit is challenged in the High Court by way of writ proceedings and the High Court feels that the matter should be remanded for fresh disposal in accordance with law, the remand need not necessarily be made to the original authority which has the power to grant the permit namely, the Regional Transport Authority. It is always a question to be decided in each case whether the remand should be to the State Transport Appellate Tribunal or to the Regional Transport Authority. In most cases it would be proper if the remand is made to the State Transport Appellate Tribunal

Where from an order passed by the Regional Transport Authority granting a permit to a certain applicant in a certain route several appeals are filed by the several disappointed applicant to the State Transport Appellate Tribunal and from the decision given in such appeals by a consolidated order, only one of the appellants before the State Transport Appellate Tribunal initiates writ proceedings in the High Court challenging the appellate order, the State Transport Appellate Tribunal and the High Court decides to remand the case for fresh disposal of the matter according to law, the remand should only be confined to the parties before the High Court in the writ proceedings The High Court cannot, simply because as a matter of convenience the State Transport Appellate Tribunal dealt with all the appeals relating to one route by a consolidated order, direct that all the appeals disposed thereby should be revived and re-heard There is no reason why when only one party brought the matter before the High Court and the appellants in the other appeals were content with the order passed by the State Transport Appellate Tribunal the High Court should interfere in favour of those persons also who had not thought fit to challenge the order of the State Transport Appellate Tribunal

Appeals by Special Leave from the Judgments and Orders dated the 1st May, 1964, 5th October, 1964 and 22nd April, 1964 of the Madras High Court in Writ Appeals Nos 215 of 1962, 74 of 1964 and 151 of 1963 respectively.†

*M. N Rangachari*, Advocate, and *M K Ramamurthi*, *R. K Garg*, *D P Singh* and *S. C Agarwal*, Advocates of *M/s Ramamurthi & Co*, for Appellant in C. A No 907 of 1964

*G Ramaswamy*, Advocate and *M K Ramamurthi*, Advocate of *M/s Ramamurthi & Co.*, for Appellant (In C A No. 150 of 1965).

*M C Setalvad*, Senior Advocate, (*G Ramaswamy*, Advocate, and *M K Ramamurthi*, Advocate of *M/s. Ramamurthi & Co.*, with him), for Appellant (In C A. No. 363 of 1965).

*S Thirumalai* and *R Gopalakrishnan*, Advocates, for Respondent No 1 (In all the Appeals)

*M. K. Ramamurthi*, Advocate of *M/s Ramamurthi & Co*, for Intervener No. 1.

*N G Krishna Iyengar* and *R Gopalakrishnan*, Advocates, for Intervener No 2.

The Judgment of the Court was delivered by

*Wanchoo, J*—These appeals by Special Leave raise common questions and will be dealt with together. We shall set out the facts in C A No 363 to understand the questions raised in these appeals The Regional Transport Authority, South Arcot, granted a stage carriage permit on the route Kumbakonam to Neiveli to the first respondent out of a large number of applicants This led to seven appeals against the grant of the permit before the State Transport Appellate Tribunal Those seven appeals were heard together by the Appellate Tribunal and it set aside the order of the Transport Authority granting the permit to the first respondent and instead granted the permit to the appellant This was on 7th August, 1962 Thereupon the first respondent filed a writ petition in the High Court at Madras challeng

† I.L.R. (1964) 2 Mad. 821.

ing the order of the Appellate Tribunal. This writ petition came up for hearing on 5th March, 1964, before a learned Single Judge On the same date, this Court decided in *B Rajagopala Naidu* v *State Transport Appellate Tribunal and others*[1] that Government Order No 1298 issued by the Government of Madras under section 43-A as introduced by the Madras Amending Act (XX of 1948) in the Motor Vehicles Act, (IV of 1939), could not be issued under that section inasmuch as it purported to give directions in respect of matters which had been entrusted to tribunals constituted under the Act and which had to be dealt with by them in quasi-judicial manner In consequence this Court set aside the order of the Appellate Tribunal in that case as it was based on the provisions of the impugned Government Order The decision of this Court, it seems, was brought to the notice of the learned Single Judge, and following that decision, he allowed the writ petition on 10th March, 1964 and quashed the order of the Appellate Tribunal leaving it free to dispose of the appeal afresh if it could do so or remit the matter in its turn to the Transport Authority for fresh disposal. This led to a Letters Patent Appeal by the present appellant which was disposed of by a Division Bench of the High Court on 22nd April, 1964 The principal argument before the Appeal Court was that every order of the Transport Authority or the Appellate Tribunal need not be quashed in view of the decision of this Court in *Rajagopala Naidu's case*[1], but only those orders should be quashed which had proceeded on the basis of the Government Order referred to above It was further contended that the present order of the Appellate Tribunal had not proceeded on the basis of the Government Order referred to above and therefore need not be quashed The Appeal Court did not accept the contention that the order of the Appellate Tribunal in the present case was not vitiated by being based on the Government Order in question It consequently dismissed the appeal. It then considered the question as to what order should be passed in the circumstances, and whether the matter should be remanded to the Transport Authority or to the Appellate Tribunal for disposal It took the view that if in every case the remand was made to the Transport Authority it would lead to serious public inconvenience, for the consequence of the quashing of orders of the Transport Authority would be that stage carriages on many routes would stop plying The Appeal Court therefore thought that unless there were exceptional reasons it would be sufficient if the order of the Appellate Tribunal alone was quashed and the matter remitted to it for consideration untrammelled by the Government Order in question, Finally the Appeal Court considered the question as to which parties should be heard again by the Appellate Tribunal on remand It was contended before the Appeal Court that only the parties which came to the High Court by way of writ proceedings should be heard by the Appellate Tribunal and not others who might have preferred appeals to the Appellate Tribunal but had not proceeded further by way of writ proceedings to the High Court The Appeal Court was unable to accept this contention and was of the view that in the peculiar situation that had arisen all the appeals that had been disposed of by a single appellate order should be reconsidered by the Appellate Tribunal as the taint affected the entire appellate order which must be considered as one The Appeal Court therefore ordered that the Appellate Tribunal should consider all the seven appeals that had been filed before it, even though only one of the appellants before the Appellate Tribunal had come to the High Court by way of writ proceedings. The Appeal Court having refused to grant leave, the Appellant got Special Leave from this Court, and that is how the matter has come up before us.

Three points have been urged before us on behalf of the appellant, namely .—

"(i) The Appeal Court was not right in coming to the conclusion that the order of the Appellate Tribunal had been influenced by the Government Order in question ,

(ii) The respondent could not be heard to say that the Government Order in question was bad as it had relied on the said Government Order before the Transport Authority , and

(iii) The Appeal Court was not right in holding that all the appeals which had been disposed of by one order by the Appellate Tribunal should be revived and re-heard when only one of the appellants had come to the High Court by way of writ proceedings, and that when the Appeal Court sent

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1. (1964) 2 S C J 570 (1964) 2 M L J (S C) S.C.R. 1 , A.I.R. 1964 S.C 1573. 113 . (1964) 2 An W R. (S C) 131 (1964) 7

the matter back to the Appellate Tribunal it should have directed the Appellate Tribunal to consider the respective cases of only two parties before the High Court *i.e.*, the present appellant and the present respondent."

We are of opinion that there is no force in the first two contentions raised on behalf of the appellant. We agree with the Appeal Court that the Appellate Tribunal was plainly influenced by the Government Order when it dealt with the appeals before it and this cannot be said to be a case where the decision of the Appellate Tribunal was not influenced by the Government Order in question. A perusal of the order of the Appellate Tribunal shows that it considered the various aspects which were mentioned in the Government Order in question. It had even referred in some of the appeals to the marks obtained by various operators. In these circumstances it cannot be said that the Appellate Tribunal was not influenced by the Government Order in question. We also see no force in the contention that as the respondent had relied on the Government Order it was not open to it to urge in the High Court that the Government Order was bad. Before the decision of this Court, referred to above, the Government Order had always been relied upon by applicants for permits. That is no reason for holding that the respondent was barred from raising the question that the Government Order was bad after the decision of this Court.

This brings us to the last question, namely, whether the Appeal Court was right in remitting the matter to the Appellate Tribunal and in ordering that all the appeals before it should be re-heard. It is true that in *Rajagopala Naidu's case*[1], this Court had ordered that the matter be remanded to the Transport Authority and not to the Appellate Tribunal. That however does not mean that in every case where there has to be a remand it must be to the original authority which has the power to grant the permit. As the Appeal Court has pointed out there may be serious public inconvenience specially in the matter of new routes if the order of the Transport Authority is also set aside with the result that such new routes would be without any transport facility. It is therefore always a question to be decided in each case whether the remand should be to the Appellate Tribunal or the Transport Authority. We agree with the Appeal Court that in most cases it would be proper if the remand is made to the Appellate Tribunal to consider the appeals before it without being influenced by the Government Order in question.

The appellant then contends that even so the Appellate Tribunal should have been asked to consider the cases of the appellant and the respondent only on remand and the Appeal Court was not right in ordering the Appellate Tribunal to consider all the appeals afresh. It is true that generally the Appellate Tribunal deals with all appeals relating to one route by one order. It is also true that before the decision of this Court the Appellate Tribunals were generally influenced by the Government Order in question. There is therefore some force in the observation of the Appeal Court that where the disposal of appeals has been found to have departed from known principles of judicial procedure all the appeals disposed of by one order should be revived. But there is one serious difficulty in accepting this view of the Appeal Court. Even though all the appeals with respect to one route may have been disposed of by a single appellate order in form, in reality the appellate order consists of as many orders as there are appeals disposed of thereby. In this very case there were seven appeals before the Appellate Tribunal and the order says that the appeal of the appellant alone was allowed while the other appeals were dismissed. Now if none of the parties concerned in the seven appeals had come to the High Court in writ proceedings within a reasonable time, the order of the Appellate Tribunal would have become final, even though it might have been influenced by the Government Order in question. Therefore there seems to be no reason why when only one party brought the matter before the High Court by way of writ proceedings against another party, and the appellants in the other six appeals were content with the order passed by the Appellate Tribunal, the High

1. (1964) 2 M.L.J. (S.C.) 131 : (1964) 2 An.W.R. (S.C.) 131. (1964) 2 S.C.J. 570 (1964) 7 S.C.R. 1.

Court should interfere in favour of those persons also who had not thought fit to challenge the order of the Appellate Tribunal. On principle therefore it does not appear right that the High Court should set aside orders in appeal passed by the Appellate Tribunal when the parties to those appeals do not bring up the matter before the High Court, simply because as a matter of convenience the Appellate Tribunal deals with all the appeals relating to one route by a consolidated order. Therefore, we are of opinion that the remand should only be confined to those parties which came to the High Court and not extend to others, as the High Court would have no jurisdiction to interfere with the orders of the Appellate Tribunal either in favour of or against the parties which have not come to it. In the circumstances the order of the Appeal Court will have to be modified and the remand confined to a reconsideration of the appeal of the present appellant alone as against the claims of the respondent, and the Appellate Tribunal should decide between these two only who should be granted the permit for the route in question.

Turning now to Appeal No. 907, we find that the permit was granted by the Transport Authority to respondent No. 1 out of 32 applicants. Ten of the applicants appealed before the Appellate Tribunal. Of these, the appeal of the present appellant was allowed and the order of the Transport Authority granting the permit to the respondent was set aside and the permit was granted to the appellant instead. The respondent filed a writ petition before the High Court against the order of the Appellate Tribunal. The learned Single Judge quashed the order of the Appellate Tribunal and remanded the matter for disposal of the appeal in question afresh. This order of the learned Single Judge was taken in appeal by the present appellant and the appeal was heard by a Full Bench. It appears that a new ground was urged before the Appellate Tribunal with respect to the respondent being a *benamidar* of Aruppukottai Sri Jaya Vilas (P.), Limited, and that was taken into consideration by the Appellate Tribunal. The Appeal Court set aside the view of the learned Single Judge with respect to this. But it remitted the matter to the Appellate Tribunal for fresh disposal in view of the decision of this Court in *Rajagopala Naidu's case*[1]. It is not clear whether the Appeal Court intended by its order that all the appeals before the Appellate Tribunal should be revived and re-heard, but this is how apparently the order has been interpreted. In view of our decision in C.A. No. 363 we order that when the matter is re-heard by the Appellate Tribunal, it shall confine itself to the case of the appellant and respondent No. 1 before us and not consider the cases of other appellant's before it who had not gone to the High Court against the Appellate Tribunal's order. We however express no opinion on the new ground which was raised before the Appellate-Tribunal as to the question of *benami* and that matter may have to be considered after the fresh decision of the Appellate Tribunal.

We now come to Appeal No. 150. It appears that there were two writ petitions before the High Court. They gave rise to two appeals. The appeal before us is only from one of the appeals, in which the present appellant was the appellant and the present respondent No. 1 was respondent No. 1. The appeals failed before the Appeal Court in view of the decision of this Court in *Rajagopala Naidu's case*[1]. The only point raised before us is whether the order of the High Court reviving other appeals before the Appellate Tribunal besides the two between the parties which went to the High Court is correct. In view of our decision in Appeal No. 363 the reconsideration before the Appellate Tribunal will only be confined to the parties which went to the High Court in writ proceedings and the respondents therein.

We therefore partially allow all the appeals and vary the order of the Appeal Court in the manner indicated above. In the circumstances we pass no order as to costs in all the appeals.

V.K. ——— *Appeals partially allowed.*

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1. (1964) 2 S.C.J. 570 : (1964) 2 M.L.J. (S.C.) 131 : (1964) 2 An.W.R. (S.C.) 131 : (1964) 7 S.C.R. 1.

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—A. K. SARKAR, J. R. MUDHOLKAR AND R. S. BACHAWAT, JJ.

K. V. Srinivasa Ayyangar .. *Appellant**

*v.*

P. N. Venkatasubramania Iyer and others .. *Respondents.*

*Madras Agriculturists Relief Act (IV of* 1938), *as amended by Madras Act (XXIV of* 1950), *section* 8 Explanation *III—Scope—Benefit of* Explanation *III—When can be availed of.*

By virtue of *Explanation* III to section 8 of the Madras Agriculturists Relief Act (IV of 1938), as amended by Madras Act (XXIV of 1950), the benefit of section 8 (1) would be available in a case where (*a*) a debt has been renewed or included in a fresh document and (*b*) where that is done (i) by the same debtor, or (ii) by his heirs, legal representatives or assigns or (iii) by any other person acting on his behalf or (iv) by any other person acting in his interest. Such a transaction will be entitled to the benefit of section 8 of the Act if the renewal or fresh agreement is in favour of (*a*) the same creditor or (ii) of any other person acting on his behalf or (*c*) any other person acting in his interest.

In the instant case the benefit of *Explanation* III could not be availed of by the debtor as the series of renewals of the original promissory note executed in 1930 were not in favour of the same creditor or in favour of some other person acting in his interest.

Appeal from the Judgment and Decree, dated the 10th October, 1958, of the Madras High Court in O.S. Appeal No. 1 of 1954.

*T. V. R. Tatachari*, Advocate, for Appellant.

*M. Sundram, K. Jayaram* and *R. Thiagarajan*, Advocates, for Respondent No. 1.

The Judgment of the Court was delivered by

*Mudholkar, J.*—This is an appeal from a judgment of the Madras High Court modifying the decree passed by a single Judge of that High Court in a suit for recovery of money.

Admittedly the appellant had executed a promissory note at Madras for a sum of Rs. 10,600 in favour of one Narayana Iyer, since deceased, on 28th January, 1946, and agreed to pay interest on that amount at 12 per cent per annum. It is also admitted that no repayment was made by the appellant. Narayana Iyer, therefore, instituted a suit against him for recovery of a sum of Rs. 14,402-5-0, which includes interest upon the sum of Rs. 10,600.

The appellant contended that the promissory note was only a renewal of a previous promissory note which itself as well as three earlier promissory notes were in renewal of the original promissory note for Rs. 1,000 executed in the year 1930. According to the appellant that promissory note was executed by his brother but was renewed by the appellant himself in the year 1932, that this promissory note was renewed on 11th January, 1937, by him and that at that time Narayana Iyer had given an additional amount of Rs. 350 to him. The amount for which this promissory note was executed was Rs. 4,000 and it included interest on the first advance upto that date. Narayana Iyer, however, instead of taking a promissory note in his own name took it in the name of General Bank which is a private limited company which admittedly was under his control. The debt was renewed in favour of the General Bank on 3rd January, 1940, by executing a fresh promissory note for Rs. 5,650 on that date and again on 13th September, 1944, when it was renewed by obtaining a promissory note for Rs. 9,275. According to the respondents Narayana Iyer paid off the dues to the General Bank at the instance of the appellant and obtained a promissory note in his favour for Rs. 10,600. As the amount was not paid, Narayana Iyer instituted the suit out of which this appeal arises. He, however, died during the pendency of the suit and is now represented by his sons the respondents. Upon the aforesaid facts and the further fact that the appellant

* C.A. No. 543 of 1963. 6th January, 1966.

is an agriculturist he claimed that he was entitled to the benefits of the Madras Agriculturists Relief Act IV of 1938 He claimed that under the provisions of that Act he was entitled to have the debts scaled down

His plea was upheld by the learned single Judge of the High Court who held that the respondents after scaling down the interest as provided in the Act were entitled to a sum of Rs 1,350 together with interest thereon at 6¼ per cent from 22nd March, 1938, upto the date of the decree. In the appeal preferred by the respondents under the Letters Patent the appeal Court held that the respondents were entitled to a decree for the entire amount for which the promissory note was executed, that is, Rs 10,600 together with interest thereon at 6¼ per cent per annum. In coming to this conclusion the appeal Court placed an interpretation on *Explanation* III to section 8 of the Act different from that placed by the learned single Judge.

Section 7 of the Act provides that all debts payable by an agriculturist at the commencement of the Act shall be scaled down in accordance with the provisions of Chapter II The Act received assent of the Governor General on 11th March, 1938, and was first published in the Official-Gazette on 22nd March, 1938, and must be deemed to have come into force as from the former date. Section 8 provides for the scaling down of debts incurred before 1st December, 1932 Sub-section (1) thereof says that all interest outstanding on the 1st of October, 1937, against an agriculturist shall be deemed to be discharged and only the principal outstanding on that delt shall be deemed to be the amount repayable by the agriculturist debtor. Sub-sections (2), (3) and (4) of that Act deal with classes of cases in which payments have been made from time to time by the debtor to the creditor It is not necessary to refer to them because even according to the appellant he had not made any repayments before the execution of the promissory note in the suit. It is common ground that *Explanations* I, II and IV have no application to the present case. The only explanation which is relevant is *Explanation* III. This explanation has been twice amended The original explanation was as follows :

> " Where a debt has been renewed or included in a fresh document in favour of the same creditor the principal originally advanced by the creditor together with such sums, if any, as have been subsequently advanced as principal shall alone be treated as the principal sum repayable by the agriculturist under this section "

The amending Act XXIII of 1948 substituted for it the following:

> " Where a debt has been renewed or included in a fresh document executed before or after the commencement of this Act, whether by the same or a different debtor and whether in favour of the same or a different creditor the principal originally advanced together with such sums, if any, as have been subsequently advanced as principal shall alone be treated as the principal sum repayable under this section "

This was amended by Madras Act XXIV of 1950 and now runs thus :

> " Where a debt has been renewed or included in a fresh document executed before or after the commencement of this Act, whether by the same debtor or by his heirs, legal representatives or assigns or by any other person acting on his behalf or in his interest and whether in favour of the same creditor or of any other person acting on his behalf or in his interest, the principal originally advanced together with such items, if any, as have been subsequently advanced as principal shall alone be treated as the principal sum repayable under this section "

It is common ground that it is the explanation which was amended by Act XXIV of 1950 which applies to the case before us It will be seen that under the original explanation the benefit of sub-section (1) of section 8 was available only in cases where the debt had been renewed in favour of the same creditor as the one from whom it was originally obtained It is contended on the appellant's behalf that by virtue of the amendment of 1948 the benefit of the provision was available even if the creditor in whose name the debt was renewed was different from the one who had originally advanced the loan and also even where the original debtor was different from the one who executed the document under which the debt was renewed.

It is pointed out that the second amendment was necessitated by reason of certain decisions of the Madras High Court holding that the words " different creditor " in *Explanation* III to section 8 did not include a third party in whose favour the debtor had executed a document renewing an earlier debt. According

to learned Counsel this interpretation defeated the object which the Legislature had in view in amending *Explanation III* in 1948 and that, therefore, that explanation was amended a second time to make it clear that once it is found that a document was in renewal of a previous debt the benefit of section 8 would be available to the promisor whether the person renewing it or the person in whose favour it is renewed is different.

It is unnecessary for us to consider what the reason for amending *Explanation III* by Act XXIII of 1948 was All that we are concerned with is the explanation as amended by Act XXIV of 1950 By virtue of this explanation the benefit of section 8 (1) would be available in a case where (*a*) a debt has been renewed or included in a fresh document ; and where that is done, (*b*)

(i) by the same debtor ; or

(ii) by his heirs, legal representatives or assigns ; or

(iii) by any other person acting on his behalf ; or

(iv) by any other person acting in his interest.

Such a transaction will be entitled to the benefit of the Act if the renewal or fresh agreement is in favour of (*a*) the same creditor ; or (*b*) of any other person acting in his behalf, or (*c*) any other person acting in his interest In the instant case though the debotor in the transaction of 1930 was stated to be the appellant's brother, in all subsequent transactions it was the appellant who was the debtor. It would follow, therefore, that the requirements of the explanation pertaining to the debtor are satisfied in the sense that the same person has been the debtor The second requirement of the explanation is with respect to the creditor As already stated, after 1940 it was not Narayana Iyer but the General Bank which was the creditor up to 28th January, 1946, on which date the promissory note in suit was executed by the appellant in his favour The General Bank has an independent existence and even though the controlling interest therein was with Narayana Iyer and his family it would not be correct to say that there is an identity between that bank and Narayana Iyer Mr. Tatachari, however, contended that it was Narayana Iyer who was the original creditor and that as he had full power of management and control with respect to the General Bank he went on obtaining promissory notes from the appellants, sometimes in his own favour and sometimes in favour of the Bank. For all practical purposes, therefore, according to the appellant, the creditor has been the same throughout. We cannot accept this argument in the absence of any material to show that the Bank acted on his behalf when the appellant executed the promissory notes dated 3rd January, 1940 and, 30th September, 1944, in favour of the Bank The contention of Mr Tatachari then is that the Bank in obtaining those promissory notes in renewal of the original debt was acting in his interest and that, therefore, the explanation was available to the appellant. In the High Court it was urged that when the appellant executed the promissory note dated 28th January, 1946, Narayana Iyer acted in the interest of the Bank The ground on which the argument advanced before the High Court and the argument advanced before us is, however, the same It is that the words " in the interest of " mean " for the benefit of ". Even assuming that that is the meaning to be given to these words the argument of learned Counsel cannot be sustained on the facts of this case. It has been found as a fact by the appeal Court that Narayana Iyer actually paid Rs. 10,600 by cheque in favour of the General Bank Ltd., to the creditor of the appellant It has also been found by the High Court that Narayana Iyer paid off the debt due from the appellant to the Bank at the request of the appellant for discharging the appellant's liability upon the promissory note executed by him in favour of the Bank. These findings of the High Court have not been seriously challenged before us and in our opinion quite rightly. In view of these findings the contention of learned Counsel that the payment was made " in the interest of the creditor " cannot be sustained. In the circumstances, therefore, we uphold the decree of the appeal Court and dismiss the appeal with costs.

V.K. ——— *Appeal dismissed.*

## THE SUPREME COURT OF INDIA.

PRESENT.—J S SHAH, V RAMASWAMI AND V. BHARGAVA, JJ.

Commissioner of Wealth-tax, Madras .. *Appellant**

*v.*

Ramaraju Surgical Cotton Mills, Ltd. .. *Respondent.*

*Wealth-tax Act, (XXVII of* 1957), *section* 5 (1) (xxi)—*Wealth-tax—Exemption—Assessee, an industrial undertaking—New and separate unit set up after the Act—Net wealth employed in establishing the new unit—Construction of factory buildings, erection of plant and machinery after the Act—Exemption—Period of exemption—Setting up unit—Commencement of operations for the establishment of unit—Distinction*

The assessee, a public limited company incorpoated in 1939 and manufacturing absorbent cotton wool, resolved to establish a new spinning unit in March, 1955, and obtained a licence under the Industries (Development and Regulation) Act, 1951 in August, 1955 The assessee placed orders for the purchse of machinery and plant in January-February, 1956, commenced construction of the factory buildings in March, 1956 and completed the same by December, 1957 The erection of spinning machinery and plant in the buildings was completed in several stages commencing from June, 1957 Licence for working the factory was obtained from the Inspector of Factories in June, 1958. Time given to complete the project was extended by the Government upto 17th March, 1959 In the assessment to wealth-tax for the assessment year 1957-58 (the corresponding valuation date being 30th September, 1956) the amount laid out in establishing the new unit was sought to be excluded by the assessee under section 5 (1) (*xxi*) of the Act The Department and the Tribunal disallowed the claim on the ground that the unit was set up prior to the Act coming into force The Tribunal proceeded on the basis that, whatever be the exact date of commencement of the operations for establishment of the unit by the assessee, it was certainly before 1st April, 1957. The High Court however, answered the Reference in favour of the assessee The Revenue appealed

*Held* that, the assessee was entitled to exclude the sum laid out in establishing the new unit and from the assessment year 1957-58

A unit cannot be said to have been set up unless it is ready to discharge the functions for which it is being set up. It is only when the unit has been put into such a shape that it can start functioning as a business or a manufacturing organisation that it can be said that the unit has been set up The word "set up" used in the main part of section 5 is equivalent to the word "established"

The expression used in the proviso, under which the period for which the exemption is available is to be determined, is not the same as used in the principal clause In the proviso the period of five successive years of exemption has to commence with the assessment year next following the date on which the company commences operations for the esablishment of the unit Operations for the establishment of a unit cannot be equated with the establishment of the unit itself or its setting up and can only signify steps that have to be taken to establish the unit. The applicability of the proviso has to be decided by finding out when the company commenced operations for the establishment of the unit which operations must be antecedent to the actual date on which the company is held to have been set up for the purposes of the principal clause

*On the facts,* as the unit was completed and became ready to go into business only after 1st April, 1957, when the Act had already come into force the assessee was entitled to the exemption under section 5 (1) (*xxi*) The Commissioner cannot be allowed to raise a new question and ask the Court to decide that the date of commencement of the operations for establishment of the unit by the assessee was different from that accepted by the Tribunal On the basis that the assessee commenced operations for establishing the unit before 1st April, 1957, the assessee was entitled to the exemption from the assessment year 1957-58.

Appeal by Special Leave from the Judgment of the Madras High Court dated 14th March, 1962, in Tax Case No 209 of 1959.

*B. Sen,* Senior Advocate (*R. N Sachthey,* Advocate, with him), for Applellant.

*A. K. Sen,* Senior Advocate (*G. Aiyar,* Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

*Bhargava, J.*—The respondent is a public limited company incorporated under the Indian Companies Act, 1913 in the year 1939 and was carrying on the business of manufacture of absorbent cotton wool In March, 1955, the Board of Directors resolved to establish a new spinning unit under the name of Sudarsanam Spinning Mills for which a licence was obtained from the Government of India under the Industrial (Development and Regulation) Act, 1951, in August, 1955 The respondent placed orders for purchase of necessary spinning machinery and plant in the months of January and February, 1956. The construction of factory buildings was taken in

* C.A. No 674 of 1965. 5th October, 1966.

hand in March, 1956 and these constructions were completed by December, 1957. The erection of the spinning machinery and the plant in the buildings was completed in several stages commencing from June, 1957. A licence from the Inspector of Factories for working the factory was obtained in June, 1958. The Statement of The Case further mentioned that the time given to complete the project was extended by the Government upto 17th March, 1959 The respondent was assessed to wealth-tax for the assessment year 1957-58, and in that year the respondent claimed that, in computing the wealth on the valuation date which was 30th September, 1956, an amount of Rs 1,43,727 should be deducted as being the amount laid out in setting up this new unit The Wealth-tax Officer disallowed the claim on the ground that the unit was set up prior to the date on which the Wealth-tax Act (hereinafter referred to as "the Act") came into force, i e., 1st April, 1957. On the same basis, the Appellate Assistant Commissioner and the Income-tax Appellate Tribunal upheld that order. Thereupon, at the request of the respondent, the following question of law was referred for opinion of the High Court of Madras :

"Whether the aforesaid asset of Rs 1,43,727 is exempt under section 5 (1) (*xxi*) read with the second proviso thereunder of the Wealth-tax Act?"

The High Court answered the question in favour of the respondent, and consequently, this appeal has been brought up to this Court by the Commissioner of Wealth-tax, Madras, by Special Leave.

The question that fell for determination depended on the interpretation of section 5 (1) (*xxi*) of the Act read with the second proviso to that clause which are reproduced below :—

"5 (1) (*xxi*) that portion of the net wealth of a company established with the object of carrying on an industrial undertaking in India within the meaning of the *Explanation* to clause (*d*) of section 45, as is employed by it in a new and separate unit set up after the commencement of this Act by way of substantial expansion of its undertaking :—

Provided that .

(*a*) * * * * *

(*b*) * * * * *

Provided further that this exemption shall apply to any such company only for a period of five successive assessment years commencing with the assessment year next following the date on which the company commences operations for the establishment of such unit"

It has been urged before us by learned Counsel for the Commissioner that the main provision of clause (*xxi*) should be interpreted in conjunction with the second proviso so as to give a harmonious construction to both parts of the provision with which we are concerned. Relying on this principle, he urged that we should hold that a new and separate unit is set up only when the company commences operations for the establishment of such unit. He relied on the principle stated by Maxwell in his book on "Interpretation of Statutes", 11th Edition at page 155, that there is no rule that the first or enacting part is to be construed without reference to the proviso.

"The proper course is to apply the broad general rule of construction, which is that a section or enactment must be construed as a whole, each portion throwing light, if need be, on the rest The true principle undoubtedly is that the sound interpretation and meaning of the statute, on a view of the enacting clause, saving clause, and proviso, taken and construed together is to prevail."

The view taken by the High Court was challenged on the ground that the High Court had interpreted the principal clause without giving full effect to the language of the proviso

The High Court held that unless a factory is erected and the plants and machinery installed therein, it cannot be said to have been set up. The resolution of the Board of Directors, the orders placed for purchasing machinery, licence obtained from the Government for constructing the machinery, are merely initial stages towards setting up, however necessary and essential they may be to further the achievement of the end. It is not, however the actual functioning of the factory or its going into production that can alone be called setting up of the factory. The setting

up is perhaps a stage anterior to the commencement of the factory Thereafter, the High Court referred to a decision of the Bombay High Court in *Western India Vegetable Products Ltd.* v *Commissioner of Income-tax, Bombay City*[1] and on its basis concluded that the proper meaning to be assigned to the expression "set up" in section 5 (1) (*xxi*) would be "ready to commence business" We are unable to agree with the learned Counsel for the Commissioner that in arriving at this view the High Court committed any error A unit cannot be said to have been set up unless it is ready to discharge the function for which it is being set up It is only when the unit has been put into such a shape that it can start functioning as a business or a manufacturing organisation that it can be said that the unit has been set up The expression used in the proviso under which the period for which the exemption is available is to be determined, is not the same as used in the principal clause In the proviso, the period of five successive years of exemption has to commence with the assessment year next following the date on which the company commences operations for the establishment of the unit. Operations for the establishment of a unit, from the very nature of that expression, can only signify steps that have to be taken to establish the unit The word "set up" in the principal clause, in our opinion, is equivalent to the word "established" but operations for establishment cannot be equated with the establishment of the unit itself or its setting up The applicability of the proviso has, therefore, to be decided by finding out when the company commenced operations for establishment of the unit, which operations must be antecedent to the actual date on which the company is held to have been set up for purposes of the principal clause. This is also the meaning that the Bombay High Court derived in the case of *Western India Vegetable Products Ltd*[1], where that Court was concerned with the interpretation of the expression "set up" as used in section 2 (11) of the Income-tax Act That Court held :—

> "It seems to us that the expression 'setting up' means, as is defined in the Oxford English Dictionary 'to place on foot' or 'to establish', and in contradistinction to 'commence' The distinction is this that when a business is established and is ready to commence business, then it can be said of that business that it is set up But before it is ready to commence business it is not set up"

This view was expressed when that Court was considering the difference between the meaning of the expression "setting up a business" and "commencing of a business." In the case before us, the proviso does not even refer to commencement of the unit The criterion for determining the period of exemption is based on the commencement of the operations for the establishment of the unit These operations for establishment of the unit cannot be simultaneous with the setting up of the unit, as urged on behalf of the Commissioner, but must precede the actual setting up of the unit In fact, it is the operations for establishment of a unit which ultimately culminate in the setting up of the unit

On this interpretation, it is clear that in this case, the claim put forward by the respondent for exemption has been rightly held to be allowable by the High Court. In the Statement of The Case and in its appellate judgment, the Tribunal did not specifically record any finding as to the date when the unit was ready to go into business and to start production In the appellate order, it was mentioned that according to the respondent the unit was set up only when the Inspector of Factories issued a licence to the respondent for working the factory, which was in June, 1958 In the Statement of The Case, the facts recited show that the construction of the factory buildings was completed by December, 1957 and the erection of the spinning machinery and plant was completed in several stages commencing from June, 1957. On these facts, the High Court, and we consider rightly, proceeded on the basis that the unit was completed and became ready to go into business only after 1st April, 1957, when the Act had already come into force Consequently, the condition laid down in the principal clause of section 5 (1) (*xxi*) was satisfied, and the company became entitled to exemption in respect of the value of the assets used in setting up this unit

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1. I.L R. (1954) Bom. 1099 56 Bom. L.R 732· A I.R 1955 Bom. 13.

Learned Counsel for the Commissioner, however, challenged the right of the respondent to claim this exemption on another ground, *viz*, that the exemption was claimed in respect of money laid out in a period which was not covered by the period envisaged in the second proviso. It was urged that if it be held that the unit was set up after the Act had come into force on the 1st April, 1957, it must also be held that the operations for the establishment of the unit had been commenced by the company almost simultaneously with the unit having been set up, and that date would, therefore, be a date subsequent to the assessment year 1957-58 in which year the exemption was claimed. This is a question which we do not think can be legitimately raised on behalf of the Commissioner at this stage The only contention before the Tribunal on behalf of the Commissioner was that the operations for the establishment of the unit had been commenced by the respondent before the Act came into force, and that it should be held that the unit was also set up at the same time when those operations were commenced. There was no contention at any stage that the operations for the establishment of the unit were commenced at a subsequent stage. In fact, it was only for the purpose of urging that the principal clause was not applicable to the case of the respondent that the position was taken up on behalf of the Commissioner that the operations for establishment of the unit had been commenced before 1st April, 1957, and the unit must be held to have been set up at the same time when those operations were commenced That submission, as we have indicated above, has no force.

In any case, the judgments passed by all the Wealth-tax Authorities show that it was at no stage in dispute that the operations for establishment of the unit had been commenced by the respondent prior to 1st April, 1957. Para 5 of the Statement of The Case mentions that the Wealth-tax Officer disallowed the claim on the ground that the unit was set up prior to 1st April, 1957 The Appellate Assistant Commissioner also in his judgment said :

"In this view of the matter, the appellant set up the undertaking even prior to 1st April, 1957 as operations were carried out prior to that date for the establishment of the undertaking The operations consisted of the seeking of permission from the Government to install the unit, and placing of orders with manufacturers of machinery and advancing of moneys towards the purchase of machinery."

The Tribunal also disallowed the claim on the basis that the respondent commenced operations for setting up the unit earlier than 1st April, 1957 It does not appear to be necessary for us to express any opinion as to the particular stage at which it can be said that a company commences operations for the establishment of a unit. In the present case, the Tribunal proceeded on the basis that, whatever be the exact date of commencement of the operations for establishment of this unit by the respondent, it was certainly before 1st April, 1957; and we consider that that fact, by itself, is sufficient to entitle the respondent to claim the exemption The Commssioner cannot, at this stage, be allowed to raise a new question and ask this Court to decide that the date of commencement of the operations for establish ment of the nnit by the respondent was different from that accepted by the Tribunal. That question was not raised and dealt with by the Tribunal It is not even a question that might have been raised before the Tribunal and the Tribunal might have failed to deal with, ner it is a question which may not have been raised before the Tribunal and, yet, was dealt with by it. On the principle laid down by this Court in *Commissioner of Income-tax Bombay* v. *Scindia Steam Navigation Co., Ltd.*[1], such a question could not be canvassed before the High Court and cannot be allowed to be raised in this Court. The question referred to the High Court had to be answered on the basis that the respondent did commence operations for establishing this unit before 1st April, 1957 ; and the further finding of fact recorded by the Tribunal is that a sum of Rs 1,43,727 had been invested in setting up the unit by 30th September, 1956, which was the valuation date for the assessment year 1957-58. The very first assessment year after the commencement of the operations for establishment of the unit was the assessment year 1957-58. In the Wealth-tax Act, assessment year has been

1. (1962) 2 S C J. 322 . (1962) 1 S C R. 788 : A.I.R. 1961 S C. 1633.

defined to mean the year for which tax is chargeable under section 3 of that Act. Since the Act came into force on the 1st April, 1957, the financial year 1957-58, was the first assessment year for which tax became chargeable, and consequently, for purposes of the second proviso to section 5 (1) (*xxi*), the assessment year following the commencement of operations for establishment of the unit in the case of any company which commenced the operations any time before the 1st April, 1957, will be the assessment year 1957-58 Prior to the year 1957-58, there was no assessment year as defined under the Act, and consequently, the first assessment year for which exemption could be claimed was this assessment year 1957-58 The respondent which had commenced operations for establishment of its new unit prior to 1st April, 1957, was rightly allowed exemption in respect of the amount that had been invested by it upto the relevant valuation date The answer returned by the High Court was, therefore, correct. The appeal fails and is dismissed with costs.

V.S. *Appeal dismissed.*

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## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—A. K. SARKAR, RAGHUBAR DAYAL AND V. RAMASWAMI, JJ.

M. V. S. Manikayala Rao .. *Appellant**

*v.*

M. Narasimhaswami and others .. *Respondents.*

*Civil Procedure Code (V of 1908), Order 21, rules 35 (2) and 96—Execution sale of shares of some members of a joint Hindu family—Order for delivery of joint possession with members of joint family and publication of such delivery of possession by beat of drum—Effect—If purchaser gets possession—Suit by auction-purchaser for partition—Limitation—Starting point—Limitation Act (IX of 1908), Articles 144 and 120—Applicability.*

In a money suit a decree was obtained against a father and his four sons who were members of a joint Hindu family Because of the pendency of an insolvency petition against the father the shares of the sons in the joint family property were brought to sale in execution of the decree. The sale was duly confirmed on 6th November, 1939 and an order was made under Order 21, rules 35 (2) and 96 of the Code of Civil Procedure, for delivery of joint possession of the properties to the purchaser along with the members of the joint family. Such possession was given by publishing that fact by beat of drum as prescribed in the rules On 16th October, 1951 the purchaser filed the suit for partition of the joint family properties. On the question whether the suit was barred by limitation,

*Held*. The suit was not barred whether Article 144 or Article 120 applied Even assuming that Article 144 of the Limitation Act is applicable, the suit is not barred By the delivery of symbolical possession on 6th November, 1939 the adverse possession of the defendants was interrupted Time has therefore to commence from that date and the suit having been brought within twelve years of that date, was not barred under that article *Radhakrishna Chanderji* v. *Ram Bahadhur*, 34 M.L J. 97: A I R. 1917 P.C. 197 (2), Rel on.

The order for symbolic possession may be wrong in law as purchaser of undivided share of coparcenery property was not entitled to any possession at all but such an order is not a nullity and has full effect if it is not set aside. If the possession delivered to the purchaser was no possession at all it would be difficult to hold that at that time anybody else was in adverse possession Since the purchaser was not entitled to possession till after a decree in a suit for partition brought by him Article 144 would seem to be inapplicable to the suit.

In the instant case there is nothing to show that the right of the plaintiff to sue for partition was ever challenged It is impossible to hold that the suit was barred under Article 120 of the Limitation Act. As what was purchased at the execution sale was only the share of the four sons, the share of another son who had been born at the date of sale would not pass to the purchaser

Appeal from the Judgment and Decree dated the 9th September, 1960 of the Andhra Pradesh High Court in Appeal Suit No 300 of 1955 †

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* C.A. No 420 of 1963. 27th August, 1965.

† (1961) 1 An.W.R. 135.

*M. Suryanarayana Murti* and *T V. R. Tatachari*, Advocates, for Appellant.

*K. R. Chaudhuri*, Advocate, for Respondents 1 to 13.

The Court delivered the following Judgments :

*Sarkar, J* (for himself and *Raghubar Dayal, J*)—In a certain money suit being Small Cause Suit No. 9 of 1953, a decree had been passed against Narasimhaswamy and his four sons who were members of a Mitakshara Hindu joint family. In execution of that decree the shares of the four sons in the joint family properties, described altogether as 4/5th share, were put up to auction on 21st December, 1936 and purchased by one Sivayya whose successors-in-interest are the appellants. The father Narasimhaswamy's share had not been put up for sale because an application for his adjudication as insolvent was then pending The sale to Sivayya was duly confirmed. Thereafter Sivayya sold the properties purchased by him at the auction to one Prakasalingam On 6th November, 1939, an order was made under Order 21, rules 35 (2) and 96 of the Code of Civil Procedure, for delivery of joint possession of the properties purchased to Prakasalingam along with the members of the joint family in actual possession This order was duly carried out and possession was delivered to Prakasalingam by publishing that fact by beat of drum as prescribed in these rules. Subsequently, Prakasalingam retransferred the properties to Sivayya.

On 16th October, 1951, Sivayya filed the suit out of which this appeal arises, against the then members of the joint family whose number had by that time increased, and various other persons holding as alienees from them, asking for a partition of the joint family properties into five equal shares and thereafter for possession of four of such shares by removing the defendants from possession. The trial Court decreed the suit but held that Sivayya was not entitled to a 4/5th share but only to a 2/3rd share because before the decree a 5th son had been born to Narasimhaswamy who had not been made a party to the suit or the execution proceedings and whose share had not consequently passed under the auction sale Some of the defendants appealed to the High Court of Andhra Pradesh from this judgment The High Court allowed the appeal on the ground that the suit was barred by limitation under section 144 of Schedule I to the Limitation Act. Sivayya had filed a cross-objection in the High Court on the ground that he should have been held entitled to a 4/5th share of the properties which was dismissed by the High Court without a discussion of its merits in view of its decision on the question of limitation Sivayya having died pending the appeal in the High Court, the appellants as his successors-in-interest, have come up to this Court in further appeal under Article 133 of the Constitution

Various questions had been raised in the trial Court but only two survive after its decision. They are, whether the suit was barred by limitation and whether Sivayya was entitled to a 4/5th share.

On the question of limitation, two articles of the Act were pressed for our consideration as applicable to the case. They are Articles 144 and 120 We consider it unnecessary to decide in this case which of the two articles applies for, in our view, the suit was not barred under either

As earlier stated the High Court held that Article 144 applied The application of this article seems to us to present great difficulties to some of which we like to refer. That article deals with a suit for possession of immovable property or any interest therein not otherwise specially provided for and prescribes a period of twelve years commencing from the date when the possession of the defendant becomes adverse to the plaintiff This article obviously contemplates a suit for possession of property where the defendant might be in adverse possession of it as against the plaintiff. Now, it is well settled that the purchaser of a coparcener's undivided interest in joint family property is not entitled to possession of what he has purchased. His only right is to sue for partition of the property and ask for allotment to him of that which on partition might be found to fall to the share of the coparcener whose share he had purchased. His right to possession "would date from the period

when a specific allotment was made in his favour". *Sidheshwar Mukherjee* v. *Bhubneshwar Prasad Narain*[1]. It would, therefore, appear that Sivayya was not entitled to possession till a partition had been made. That being so, it is arguable that the defendants in the suit could never have been in adverse possession of the properties as against him as possession could be adverse against a person only when he was entitled to possession Support for this view may be found in some of the observations in the Madras Full Bench case of *Vyapuri* v. *Sonamma Boi Ammani*[2].

In the case in hand the learned Judges of the High Court thought that the applicability of Article 144 to a suit like the present one was supported by the decision of the Judicial Committee in *Mahant Sundarsan Das* v *Mahan Ram Kirpal Das*[3] We feel considerable doubt that the case furnishes any assistance. It held that Article 144 extends the conception of adverse possession to include an interest in immovable property as well as the property itself In that case a puchaser of an undivided share in a property which was not coparcenery proprety, had obtained possession of that share and he was held to have acquired title to it by adversee possession. That was not a case of a person who was not entitled to possession. We are not now concerned with adverse possession of an interest in property.

Having expressed our difficulties on the matter let us proceed on the assumption without deciding it, that Article 144 is applicable. Even so, it seems to sus that the suit is not barred It is not in dispute that in order that the suit may be barred under the article the defendant must have been in uninterrupted pos session for twelve years befoe the date of the suit Now, in the present case that was not so. By the delivery of symbolical possession under the order of 6th November, 1939, the adverse possession of the defendants was interrupted. Time has, therefore, to commence to run from that date and so considered, the suit having been brought within tewelve years of that date, it was not barred under that article That would follow from the ase of *Sri Radhakrishna Chanderji* v *Ram Bahadur*[4], where it was a held that delivery of formal possession also interrupted the continuity of adverse possession.

It was howevr said that the order for delivery of possession made in the present case was a nullity because SivaÆya and his transferee who had purchased an undivided share in coparcenery property were not entitled to any possession at all We agree that the order cannot be supported in law but we do not see that it was for this reason a nullity It is not a case where the order was without jurisdiction It was a case where the learned Judge making the order had, while acting within his jurisdiction, gone wrong in law. Such an order has full effect, if it is not set aside, as it was not in this case *Yelumalai Chetti* v *Srinivasa Chetti*[5], to which we were referred, does not support the contention that the order was a nullity There a purchaser of an undivided share in coparcenery porperty at an execution sale had applied for possession under section 318 of the Code of Civil Procedure of 1882 which corresponds to Order 21, rule 95 of the present Code. That application was dimsissed as barred by limitation. Later, the purchaser who had subsequently acquired the interest of the other ocoparceners in the property under a private sale, filed a suit for possession of the whole. It was contended that the suit was barred under section 244 of the old Code (—section 47 of the present Code) as the purchaser could only proceed by way of execution. In dealing with that contention is was said that though the purchaser of an undivided shae in coparcenery property was only entitled to ask for a partition, it was not competnet to a Court on a mere application for execution by a purchaser of such a shae at a Court sale, to o der a partition and, therefore, the dismissal of the application under section 318 of the old Code had no effect by way of *res judicata* on the second suit for possession This case said nothing about the legality of an order under Order, 21, rules 35, 95 aor 96.

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1. (1953) S C J 700 (1953) 2 M L J 789 (1954) S C R 177, 188 A I R 1953 S C 487.
2. 29 M L J. 645 : (1916) I L R. 39 Mad. 811 (F.B.).
3. (1950) 1 M L J 243 L.R 77 I.A 42 : A I R 1950 P C 44
4. 34 M L J 97 A I R 1917 P.C 197 (2).
5. (1906) I.L.R. 29 Mad. 294.

It seems to us that the question of adverse possession is one of fact. If the person against whom adverse possession is set up, shows that he had in fact obtained possession, whether lawfully or not, that would interrupt any possession held adversely against him. The question is whether there was in fact an interruption of the adverse possession and not whether that interuption was justifiable in law. Under the order for delivery of symbolical possession, whether it was legal or otherwise, Prakasalingam did obtain possession and this was an interruption of the adverse possession by the respondents. In respect of the present suit time under Article 144 must, therefore, commence from that interruption.

We wish to observe here that this aspect of the matter exposes the anomaly that seems to arise from the application of Article 144 to this case. If Prakasalingam's possession under the order of 6th November, 1939 was no possession in law because, as is contended, he was not entitled to possession at all, then it would be difficult to hold that at that time somebody else was holding the property adversely to him Since Prakasalingam or his successor Sivayya was not entitled to possession till after the decree in a sit for partition brought by him, Article 144 would seem to be inapplicable to that suit.

Learned Counsel for the respondents referred us to *Mahadev Sakharan Parkar* v. *Janu Namji Hatle*[1] and *Jang Bahadur Singh* v *Hamwant Singh*[2] to show that the delivrey of symbolical possession does not avail the appellants On behalf of the appellants it was said that there decisions are no longer good law in view of the judgment of the Judicial Committee in *Sri Radha Krishna Chanderji's case*[3] Apart however from the merits of this contention which, no doubt, deserve consideration, the principle of these cases does not seem to us to be applicable to the present case. That principle was expressed in the case of *Jang Bahadur Singh*[2], which also is clearly t be implied from the decision in the case of *Mahadev Sakharam Parkar*[1], in these words,

> " If possession was delivered in accordance with law, that undoubtedly would, as between the parties to the proceedings relating to delivery of possession, give a new start for the computation of limitation and the possession of the defendants would be deemed to be a fresh invasion of the plaintiff's right and a new trespass on the property But if possession was not delivered in the mode provided by law, that delivery of possession cannot, in our opinion, give a fresh start to the plaintiff for computing limitation "

By the words " in accordance with law " the learned Judges meant, in accordance with the Code of Civil Procedure and not any other law. These cases dealt with an order for delivery of symbolical possession where an order for actual possession could have been made under the Code Because of this, it was held that the order for delivery of symbolical possession did not interrupt the adverse possession of the defzdant That is not the case here The only order for delivery of possession that could possibly be made under the Code in the present case was under O der 21, rules 35 (2) and 96 because the other members of the family whose share had not been sold were certainly entitled to remain in possession The fact that in view of the provisions of the Hindu law the order made is illegal, is irrelevant for the present purpose. That would not bring the case within the principle of either the Bombay case or the Allahabad case.

Learned Counsel for the respondents however contended that Order 21, rule 35 (2) only applied where there was a decree for joint possession and it did not apply to the present case beecause here there was only an order for delivery of joint possession and not a decree. This contention cannot be accepted because under section 36 of the Code the provisions relating to the execution of decrees are applicable to execution of orders In any case, the order is clearly within the terms of Order 21, rule 96 The delivery of symbolical possession made in this case was quite in terms of the Code and so amounted to an interruption of the respondent's adverse possession and the period of limitation for the purpose of the application of Article 144 would start from the date of such delgery. As the suit was brought within twelve

1. (1912) I L R 36 Bom 373.
2. (1921) I.L.R. 43 All. 520.
3. 34 M.L J 97 A I R. 1917 P.C. 197 (2).
4. A.I R. 1939 Bom. 322.

years from the date of that delivery of possession, Article 144 even if it applies, does not bar it.

We then turn to Article 120 In *Bai Shevantibai* v *Janardan R. Warick*[1], it has been held that to a suit like the present, this is the article that applies Learned Counsel for the respondents himself contended that this was the appropriate article to be applied This article applies to suits for which no period of limitation is provided elsewhere and prescribes a period of six years commencing from the date when the right to sue accrues Learned Counsel for the respondents relied on the observation in *Shevantibai's case*[1], that in a suit like the present one, the period of limitation under Article 120 commences to run from the date of the sale. This the case no doubt held, but we think in that respect it did not lay down the law correctly It has been held by this Court in *Mst Rukhmabai* v. *Lala Laxminarayan*[2] and *C. Mohammad Yunus* v *Syed Unnissa*[3] that the right to sue accrues for the purpose of Article 120 when there is an accrual of the right asserted in the suit and an unequivocal threat by the respondent to infringe it Now whatever the nature of the plaintiff's right in the present case, there is nothing to show that that right was ever challenged in any way by the respondents. It is impossible, therefore, to hold that his suit was barred under Article 120

The result is that the suit was not barred whether Article 144 or Article 120 applied to it.

It remains now to deal with the cross-objection We do not think that it has any merit. Both the Courts below have held that what Sivayya purchased at the auction sale was the share of the four sons of Narasimhaswamy in the joint family properties. At the date of the auction sale that share which was originally 4/5th had been reduced to 2/3rd by the birth of another son, Venugopal, to Narsimhaswamy who had not been made a party either to the suit or the execution proceedings. It is irrelevant to enquire whether after his birth the fifth son's share could be proceeded against in the execution of the decree in Suit No 9 of 1933 It is enough to say that that was not in fact done. What was purchased at the execution sale was only the shares of Venugopal's four brothers at the date of the sale and this was 2/3rd That being so, we think Sivayya was not entitled to get Venugopal's 1/6th share also allotted to him in the partition suit The cross-objection must fail. We may add that no claim has been made against Narsimhaswamy's share whose insolvency once ordered, appears subsequently to have been annulled.

In the result we would allow the appeal, set aside the judgment and decree of the High Court except as to the dismissal of the cross-objection and restore that of the learned trial Judge The appellants will be entitled to proportionate costs here and in the High Court.

*Ramaswami, J*—The question of law involved in this appeal is what is the period of limitation applicable to a suit filed by an alienee of a coparcener of an undivided share in the joint family property for general partition. The appellants are the legal representatives of the deceased plaintiff—Mamidi China Venkata Sivayya The suit was filed by him on 16th October, 1951, for partition and separate possession of the 4/5th share in the joint family properties It is alleged that he purchased the undivided share of defendants 2 to 5 at a Court auction sale held on 21st December, 1936, in execution of a decree of the Court of Small Causes The sale was confirmed on 23rd February, 1937 Later on *i e*, on 5th March, 1939 the purchaser Sivayya sold the right he had purchased to one Prakasalingam who, it is alleged, obtained symbolic delivery of possession of the undivided share of the joint family properties on 6th November, 1939 It appears that Sivayya obtained a reconveyance of the right from Prakasalingam on 11th April, 1945 Sivayya brought the present suit on 16th October, 1951, against the other coparceners and alienees from some of the coparceners The suit was filed by Sivayya for general

1 A I R. 1939 Bom 322
2 (1960) S C J 433 (1960) 2 S C.R. 253 A I.R. 1960 S C. 335
3 (1962) 1 S C J 449 (1962) 1 An.W.R. (S C) 162 (1962) 1 M L J (S C) 162 : (1962) 1 S C R 67 · A.I R (1961) S.C 808.

partition. The main defence of the contesting defendants was that the suit was barred by limitation. The trial Court held that the suit was governed by Article 144 of the Limitation Act and Article 120 did not apply The trial Court also found that there was symbolic delivery of possession in favour of Prakasalingam on 6th November, 1939 and there was break up of adverse possession of defendants 1 to 5 and that the suit was, therefore, brought within time The trial Court held that the 1/6th share of the 6th defendant, one of the coparceners did not pass to the plaintiff as the 6th defendant was born before the Court sale and he was not impleaded as a party in the present case The trial Court accordingly gave a decree for partition and separate possession to the plaintiff of 2/3rds share of the properties mentioned in Schedule 'A' of the plaint. The defendants preferred an appeal before the High Court of Andhra Pradesh against the judgment and decree of the trial Court The plaintiff also filed a Memorandum of Cross-Objections claiming the 1/6th share of the defendant also. The High Court held that Article 144 of the Limitation Act applied to the suit and the adverse possession of the defendants commenced from the date of the auction sale and that the suit was barred by limitation as it was filed on 16th October, 1951, i e, more than 12 years after the auction sale The High Court also held that the symbolic delivery had no legal effect and did not break the adverse possession of the defendants Accordingly the High Court allowed the appeal and the suit was dismissed with costs throughout. The present appeal is presented on behalf of the legal representatives of the deceased plaintiff—Sivayya against the judgment and decree of the High Court of Andhra Pradesh.

Before dealing with the question as to which Article of the Limitation Act applies to the present case it is necessary to examine the legal position of persons like Sivayya who purchase shares of some of the coparceners of the Hindu joint family It is well settled that the purchaser does not acquire any interest in the property sold and he cannot claim to be put in possession of any definite piece of family property The purchaser acquires only an equity to stand in the alienor's shoes and work out his rights by means of a partition. The equity depends upon the alienation being one for value and not upon any contractual nexus The purchaser does not become a tenant in common with the other members of the joint family. He is not entitled to joint possession with them The alienee's suit for partition must be one for partition of the entire property and not for the partition of any specific item of, or interest in, the family property. Such a suit, however, will not be technically on a par with a suit for partition filed by a coparcener Such a suit would not have the necessary effect of breaking up the joint ownership of the members of the family in the remaining property nor the corporate character of the family. (Mayne's Hindu Law, Eleventh edition, page 489.)

On behalf of the appellants learned Counsel put forward the argument that the right of the alienee to sue for partition is a continuing right and there is no period of limitation for enforcing such right. In my opinion, there is no warrant for this argument. A suit for partition filed by the alienee from a coparcener is not, in a technical sense, a suit for partition and, as already stated, such a suit will not have the necessary effect of breaking up the joint ownership of the members of the family in the joint property nor the corporate character of the family. As observed by Bhashyam Ayyangar, J., in *Aiyyagari Venkataramayya* v. *Aiyyagari Ramayya*[1]:

"The vendee's suit to enforce the sale by partition is not a suit for 'partition', in the technical sense in which 'partition' or 'vibhaga' is used in the Hindu law A suit for partition, in the technical sense, can be brought only by an undivided member of the family The right to such partition is personal to him and not transferable Such a suit can be brought only in the lifetime of the co-parcener and even if so brought, it will abate if he should die before final decree, without leaving male issue. A partition in the technical sense, whether effected amicably or by decree of Court, breaks up not only the joint ownership of property, but also the family union i e, the corporate character of the family Each member thereafter becomes a divided member with a separate line of heirs to himself An undivided member of a family, though he may alienate either the whole (*Gurulingappa* v *Nandappa*[2]), or any part of his undivided share will continue to be an undivided member of the family with rights of survivorship between himself and the remaining members in respect of all the family property other than what

1. (1902) I.L.R. 25 Mad. 690 at p. 717. 2. I.L.R. 21 Bom. 797.

he has transferred .. ... The transferee, however, does not step into the shoes of the transferor as a member of the family and there will be no community of property between him and all or any of the members of the family in respect either of the property transferred to him or the rest of the family property "

In my opinion, a suit like the present one will fall within Article 144 of the Limitation Act It is true that an alienee of an undivided interest of a Hindu coparcener is not entitled to joint possession with the other coparcener and he is also not entitled to separate possession of any part of the family property But the alienee is entitled to obtain possession of that part of the family property which might fall to the share of his alienor at a partition. What the alienee acquires by a purchase is not any interest in specific family property but only an equity to enforce his right in a suit for partition and have the property alienated set apart from the alienor's share, if possible In the present case the alienee has instituted a suit for general partition with the prayer that he may be put in possession of that part of the family property which may be allotted to his alienor It is not right to consider such a suit as a suit for mere partition The main relief sought by the plaintiff is the relief for possession of that part of the property which may be allotted to the alienor's share and a relief for partition is only a machinery for working out his right and ancillary to the main relief for possession of the property allotted to the alienor's share. What the plaintiff seeks is actual delivery of possession. In my opinion, such a suit falls within the purview of Article 144 of the Limitation Act and the law on this point is correctly stated in *Thani* v *Dakshinamurthy*[1].

If Article 144 is the proper article applicable, when does time commence to run? According to the third column of Article 144, time begins to run from the date when the possession of the defendant becomes adverse to the plaintiff As I have already pointed out, the possession of the non-alienating members of the family cannot be deemed to be possession on behalf of the alienee also, because the purchaser-alienee does not acquire any interest in the property sold and does not become tenant-in-common with the members of the family nor is he entitled to joint possession with them It is clear that in the absence of a clear acknowledgment of the right of the alienee or participation in the enjoyment of the family property by the alienee, the possession of the non-alienating coparceners would be adverse to the alienee, from the date on which he became entitled to sue for general partition and possession of his alienor's share. The fact that the alienee has purchased an undivided interest of joint family property is not inconsistent with the conception of adverse possession of that interest. As Lord Radcliffe observed in *Sudarsan Das* v. *Ram Kirpal Das*[2]:

"Now it is the respondent's case—It is in fact their main contention on this issue—that the appellant has never at any time had adverse possession against them because, the disputed property being a four-anna undivided share, his possession has been throughout no more than a joint possession with them And the joint possession which coparceners enjoy in respect of the undivided property involves that *prima facie*, the exclusive possession of any one of them is not adverse to the others Their Lordships have no doubt of the validity of this general rule , but they are unable to think that it will be in any way departed from if they hold that in respect of the disputed property itself the appellant's possession has been adverse to the owners of the other shares In truth there is some confusion involved in the argument What is in question here is not adverse possession of the block of property in which the various undivided interests subsist but adverse possession of one undivided interest Article 144 certainly extends the conception of adverse possession to include an interest in immovable property as well as the property itself nor was it disputed in argument by the respondents that there could be adverse possession of an undivided share, given the appropriate circumstances "

In the present cae, therefore, adverse possession began to run from the date of purchase of the undivided share *i e*, from 21st December, 1936, but it was submitted on behalf of the appellants that Prakasalingam obtained symbolic delivery and possession of the undivided share on 6th November, 1939, after notice to defendants 2 to 5 and there was a fresh cause of action to sustain the present suit for possession It was contended on behalf of the respondents that the symbolic deliery was illegal and the executing Court was not competent to make an order of delivery of possession, either symbolic or actual with regard to the sale of an undivided interest of joint

1 (1955) 1 M L J 414 I L R 1955 Mad 1278 . A.I.R. 1955 Mad 288.

2 L R 77 I A 42 (1950) 1 M L J 243 : A.I.R. 1950 P.C. 44 at 47.

family property. In support of this argument reliance was placed on the decision in *Yelumalai Chetti* v. *Srinivasa Chetti*[1], in which it was held that the purchaser at a Court sale of the share of an undivided member of a joint Hindu family acquires only a right to sue for partition and for delivery of what may be allotted as the share of such undivided member and the Court cannot, on a mere application for execution by such purchaser, enforce his right by an order for partition It was further held that no such order can be made under section 318 of the Code of Civil Procedure and the dismissal by the Court of an application by the purchaser under section 318 cannot be a bar to a suit by the purchaser for partition. Even assuming that the grant of symbolic delivery of possession ought not to have been made and that the executing Court acted illegally in making such an order, it cannot be argued that the executing Court had no jurisdiction to make the order or that the act of symbolic possession was a nullity in the eye of law I am, therefore, of the opinion that the grant of symbolic possession by the Court in favour of Prakasalingam after notice to the defendants 2 to 5 was tantamount in law to delivery of actual possession and, therefore, sufficient to break up the continuity of adverse possession in favour of the defendants. In *Sri Radha Krishna Chanderji* v *Ram Bahadur*[2], it was held by Lord Sumner that symbolic possession was available to dispossess a party sufficiently where he was a party to the proceedings in which it was ordered and given I am accordingly of the opinion that the suit of the plaintiff is not barred by limitation under Article 144 of the Limitation Act and the view taken by the High Court on this part of the case is not correct ad must be overruled.

On behalf of the appellants it was also argued that a decree for 5/6th share of the joint family properties and not merely for 2/3rds share should have been granted The claim of the appllants was rejected by the trial Court It is not disputed by the plaintiff that the 6th defendant was born before the Court sale and it is also not disputed that the execution case was taken out only against defendants 2 to 5 It is manifest that the plaintiff is not entitled to recover the possession of the share of the 6th defendant in execution proceedings and there is no merit in the cross-objection filed on behalf of the plaintiff in the High Court. I am unable to accept the argument advanced by the appellants on this point.

For these reasons I hold that the judgment and decree of the High Court should be set aside and the judgment and decree of the trial Court should be restored and a preliminary decree of partition of the properties should be granted as mentioned in the trial Court's decree. The appeal is accordingly allowed with costs

K.S. —————— *Appeal allowed.*

## THE SUPREME COURT OF INDIA.

PRESENT:—J. C SHAH AND V. BHARGAVA, JJ.

Sree Meenakshi Mills, Ltd., Madurai .. *Appellant**

*v.*

Commissioner of Income-tax, Madras .. *Respondent.*

*Income-tax Act (XI of 1922), section 10 (2) (xv)—Business expenditure—Legal expenses—Restrictions in the carrying on of a business—Imposed by legislative or executive act—Legal proceedings to quash act—Expenses—Allowable business expenditure—Expenditure incurred need not be directly to earn income—Persistence in proceedings by filing successive appeals or ultimate failure—Not relevant—Assessee, mills carrying on business—Cotton spinning and weaving—Delivery of yarn, manufactured, to weavers outside for weaving into cloth—Cotton Control Order—Assessee prohibited from delivering yarn to such weavers—Legal proceedings and successive appeals to quash the order—Expenses thereof and costs payable to Government—Permissible business expenditure.*

The assessee-mills was carrying on business of cotton spinning and weaving As its handlooms were inadequate to weave the yarn produced by the mills, part of the yarn produced was distributed to weavers outside the factory engaged by the assessee to weave the yarn into cloth On 7th

1. (1906) I L R 29 Mad 294
2. 34 M L J 97 : A I R 1917 P C 197 (2)

* C As, Nos, 557 and 558 of 1965, 19th September, 1966.

February, 1946 the Textile Commissioner issued an order under Cotton Cloth and Yarn (Control) Order, 1945, prohibiting the assessee from selling or delivering yarn manufactured by it to such weavers. When the assessee claimed that the prohibition was *ultra vires* the authority conferred under the Control Order and continued to deliver yarn to weavers outside the factory, the Textile Commissioner issued another order prohibiting such delivery on 20th February, 1946 The assessee filed a petition for a writ of *mandamus* in the High Court praying for an order against the Textile Commissioner seeking him to forbear from acting under the Order On the dismissal of the petition as not maintainable the assessee went in successive appeals and ultimately the Privy Council dismissed the appeal The costs incurred in prosecuting the proceedings and costs ordered to be paid to Government by the assessee were claimed as business expenditure under section 10 (2) (*xvi*) On the rejection of the claim by the department, Tribunal and the High Court, the assessee appealed The Tribunal had found that the assessee did not, after 20th February, 1946, deliver any yarn to weavers outside the factory

*Held*, that the expenditure incurred to resist, in a civil proceeding, the enforcement of a measure —legislative or executive—which imposes the restrictions on the carrying on of a business, or to obtain a declaration that the measure is invalid would, if other conditions are satisfied, be admissible under section 10 (2) (*xv*) of the Act as a permissible deduction in the computation of taxable income

The primary motive in incurring the expenditure admissible to deduction under section 10 (2) (*xv*) need not be directly to earn income thereby

Persistence of the assessee in launching the proceeding and carrying it from Court to Court and incurring expenditure for that purpose or the failure of such proceedings cannot be a ground for disallowing the claim.

*Held on facts* the object of the petition filed by the assessee was to secure a declaration that the order dated 20th February, 1946 in so far as it sought to put restrictions upon the right of the assessee to carry on its business in the manner in which it was accustomed to do was unauthorised and to prevent enforcement of the order ; thereby the assessee was seeking to obtain an order from the Court enabling the business to be carried on without interference The finding of the Tribunal (the High Court ought to have taken this fact from the statement of the case and not from the other proceedings filed by the assessee in the civil Court) was that after 20th February, 1946 the assessee did not distribute any yarn contrary to the order It cannot therefore be said that the assessee was seeking to protect itself against a criminal prosecution and the consequences arising from infringement of the order dated 20th February, 1946 The expenditure was an allowable deduction under section 10 (2) (*xv*)

Appeal by Special Leave from the Judgment and Order dated the 19th September 1962, of the Madras High Court in Tax Case No 87 of 1960.

*R. Ganapathy Iyer*, Advocate, for Appellant

*R M Hazarnavis*, Senior Advocate, (*R. N. Sachthey*, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

*Shah, J*—Sree Meenakshi Mills, Ltd.—a company incorporated under the Indian Companies Act with its registered office at Madurai carries on business of cotton spinning and weaving In the premises of the factory of the company there are installed 80 handlooms These handlooms were found inadequate to weave the yarn produced by the factory and a part of the yarn produced was distributed to weavers outside the factory who were engaged by the company to weave the yarn into cloth Under clause 18-B of the Cotton Cloth and Yarn (Control) Order, 1945, issued by the Government of India, the Textile Commissioner was authorized to direct any manufacturer or dealer or any class of manufacturers or dealers, *inter alia*, not to sell or deliver any yarn or cloth of specified description except to such person or persons and subject to such conditions as the Textile Commissioner may specify On 7th February, 1946, the Textile Commissioner issued an order directing the company not to sell or deliver any yarn manufactured by the company except to such person or persons as the Textile Commissioner may specify It was recited in the order that " nothing in this order shall apply to a sale or delivery made, in pursuance of clause 18-A of the said order, to any dealer in yarn not engaged in the production of cloth on handlooms or powerlooms", The company addressed a

letter on 13th February, 1946 to the Textile Commissioner submitting that the prohibition in general terms was *ultra vires* the authority conferred by the Cotton Cloth and Yarn (Control) Order. The company continued notwithstanding the prohibition to deliver yarn to weavers and did so till 20th February, 1946 This yarn was seized under the orders of the Textile Commissioner. On 20th February, 1946, the Provincial Textile Commissioner purporting to act in exercise of authority conferred upon him by a notification issued by the Government of India, issued an order addressed to the company that :

" You should accordingly confine your delivery to the categories of persons notified below .—

(*a*) Licensed yarn dealers (in accordance with the said 18-A of the Control Order)

(*b*) To consumers who purchased yarn directly from you during the basic period 1940—42 (in accordance with my circular letter dated 4th January, 1946 referred to above)

(*c*) Your handloom factory situated in the premises of your Mills at Madurai (just the quantity of yarn required).

NOTE —Any other delivery of yarn by you which is not covered by a special order or permission of the Textile Control Authorities will accordingly be a contravention of the Textile Commissioner's order under clause 18-B referred to above "

After this order was issued, the company did not deliver any yarn to weavers.

On 4th March, 1946 the company filed a petition for a writ of *mandamus* in the High Court of Madras under section 45 of the Specific Relief Act praying for an order directing the Provincial Textile Commissioner, Madras, to desist from seizing the yarn supplied to the weavers at or around Madura and Rajapalayam for the purpose of converting the yarn belonging to the company into cloth; to restore to the company or to direct the Provincial Textile Commissioner and his subordinates to restore the yarn already seized ; and to forbear from seizing or to direct the subordinates of the Provincial Textile Commissioner to forbear from seizing the yarn that may be entrusted to the weavers by the company in the usual course of business according to the practice already obtaining for conversion into cloth. This petition was dismissed by Kunhi Raman, J., and the order of dismissal was confirmed in appeal by the High Court. The matter was then carried in appeal to the Privy Council The Judicial Committee dismissed the appeal filed by the company. They held, agreeing with the High Court, that the expression "deliver" in clause 18-B, sub-clause (1) (*b*), of the Cotton Cloth and Yarn (Control) Order, 1945, is used in its ordinary broad sense of handing over possession, as distinct from passing of property, and would include delivery of possession to a bailee. Accordingly, delivery of part of its yarn by the company to owners of handlooms outside the mill premises for conversion of the yarn into cloth for the company was in contravention of the order made under clause 18-B, sub-clause (1) (*b*). The Judicial Committee also held that a petition under section 45 of the Specific Relief Act, 1877, directing the Provincial Textile Commissioner to desist from seizing the yarn supplied to the weavers and to restore to the company the yarn already seized was incompetent as the acts in respect of which relief was asked for took place outside the limits of the Ordinary Original Civil Jurisdiction of the High Court.

The company spent Rs 20,035 in prosecuting the proceedings under section 45 of the Specific Relief Act and had also to pay Rs. 5,912 as costs to the Government of the unsuccessful appeal to the Judicial Committee. In its returns of income the company claimed deduction of the amounts of Rs. 20,035 and Rs 5,912 for the assessment years 1949-50 and 1950-51 respectively as being expenditure wholly and exclusively laid out for the purpose of its business The claims were rejected by the departmental authorities, and by the Income-tax Appellate Tribunal The Tribunal then referred the following question to the High Court of Judicature at Madras :

" Whether the expenses of Rs. 20,035 incurred in the assessment year 1949-50 and Rs 5,912 (relating to the assessment year 1950-51) being the cost paid to Government as directed by the Privy Council were expenses incurred in the ordinary course of business and allowable as deductions?"

The question as framed is somewhat vague. But it is common ground that the company claimed deduction under section 10 (2) (*xv*) of the Indian Income-tax Act,

1922 on the footing that the two amounts represented expenditure laid out wholly and exclusively by the company for the purpose of its business. The High Court answered the question in the negative. With Special Leave, the company has appealed to this Court.

The Tribunal has found that after the order dated 20th February, 1946 was issued, the company did not deliver yarn to any weaver. It is recited in the judgment of the Tribunal that a "correct order by the proper authorities was passed" on 20th February, 1946 and thereafter the company did not distribute any yarn to weavers. The averments made by the company in the petition under section 45 of the Specific Relief Act, are somewhat involved, but in substance the claim of the company was that the Provincial Textile Commissioner was incompetent to pass the order dated 20th Feburary, 1946 which placed restrictions on the business of the company and the order was "likely to cause irreparable and irretrievable injury", and it was prayed that an order do issue under section 45 of the Specific Relief Act restraining the Provincial Textile Commissioner from enforcing the order and the Textile Commissioner be prohibited by an order from seizing the yarn delivered to the weavers outside the factory and be further ordered to restore the yarn already seized No clear averment was made in the petition about the date on which the yarn seized had been delivered by the company to the weavers.

This petition failed, because the High Court had no jurisdiction to entertain the petition, and also because the expression "deliver" used in clause 18-B of the Control Order included handing over of yarn to the weavers outside the premises of the factory for conversion into cloth But expenditure incurred in prosecuting a civil proceeding relating to the business of an assessee is admissible as expenditure laid out wholly and exclusively for the purpose of the business even if the proceeding is decided against the assessee It was held by this Court in *Commissioner of Income-tax, West Bengal* v. *H Hirjee*[1], that the deductibility of expenditure under section 10 (2) (*xv*) must depend on the nature and purpose of the legal proceeding in relation to the business whose profits are under computation and cannot be affected by the final outcome of that proceeding The proceeding started by the company was in relation to the business of the company The company was thereby seeking relief against interference by the executive authorities in the conduct of its business in the manner in which it was being carried on previously. It was also seeking to obtain an order for restoration of its goods which were seized. It may be granted that the company was, in starting the proceeding, ill-advised. However wrong-headed, ill-advised, unduly optimistic or over-confident in his conviction the assessee may appear in the light of the ultimate decision, expenditure in starting and prosecuting the proceeding may not be denied admission as a permissible deduction in computing the taxable income, merely because the proceeding has failed, if otherwise the expenditure is laid out for the purpose of the business wholly and exclusively, *i.e.*, reasonably and honestly incurred to promote the interest of the business. Persistence of the assessee in launching the proceeding and carrying it from Court to Court and incurring expenditure for that purpose again cannot be a ground for disallowing the claim.

Under section 10 (2) (*xv*) of the Indian Income-tax Act as amended by Act VII of 1939 expenditure even though not directly related to the earning of income may still be admissible as a deduction Expenditure on civil litigation commenced or carried on by an assessee for protecting the business is admissible as expenditure under section 10 (2) (*xv*) provided other conditions are fulfilled, even though the expenditure does not directly relate to the earning of income. Expenditure incurred not with a view to direct and immediate benefit for purposes of commercial expediency and in order indirectly to facilitate the carrying on of the business is therefore expenditure laid out wholly and exclusively for the purposes of the trade. In *Morgan*

1. (1953) S C.J. 448 : (1953) 1 M L J 849 : (1953) 23 I.T.R 427: (1953) S.C.R. 714: A.I.R. 1953 S.C. 324.

(*Inspector of Taxes*) v. *Tate & Lyle, Ltd.*[1], the House of Lords held that expenditure incurred by a company engaged in sugar refining, in a propaganda campaign to oppose the threatened nationalization of the industry was a sum wholly and exclusively laid out for the purpose of the company's trade and was an admissible deduction from its profits for income-tax purposes. A majority of the House held that the object of the expenditure being to preserve the assets of the company from seizure and so to enable it to carry on and earn profits, the expenditure was a permissible deduction under rule 3 (*a*) of the Rules applicable to Cases (1) and (2) of Schedule D of the Income-tax Act, 1918.

The object of the petition filed by the company was to secure a declaration that the order dated 20th February, 1946 in so far as it sought to put restrictions upon the right of the company to carry on its business in the manner in which it was accustomed to do was unauthorized and to prevent enforcement of that order. thereby the company was seeking to obtain an order from the Court enabling the business to be carried on without interference. Expenditure incurred in that behalf would without doubt be expenditure laid out wholly and exclusively for the purpose of the business of the company.

It was argued however that the yarn delivered by the company to the weavers contrary to the prohibitory order dated 20th February, 1946, was attached under the order of the Provincial Textile Commissioner, and since the company violated the prohibitory order, the primary object of the petition for *mandamus* instituted by the company was to secure protection against prosecution of the company and an order for return of the goods in respect of which an offence was committed Expenditure incurred in prosecuting that claim was, it was said, not laid out wholly and exclusively for the purpose of the business. Reliance was placed upon the judgment of this Court in *H. Hirjee's case*[2], in which it was held that a person who was prosecuted for an offence under section 13 of the Hoarding and Profiteering Ordinance, 1943, on a charge of selling goods, at prices higher than were reasonable, in contravention of the provisions of section 6 thereof, and a part of his stock was seized and taken away, was not entitled to claim deduction under section 10 (2) (*xv*) of the Income-tax Act for the sums spent in defending the criminal proceedings against him because the expenditure could not be said to have been laid out and expended wholly and exclusively for the purpose of the business But the assumption underlying the argument is not true. The Tribunal has in the Statement of The Case observed in paragraph 2 :

> "Subsequently, on 20th February, 1946, a proper order by the appropriate authority was passed and it is common ground that after that date, at any rate no further distribution of yarn was made by the assessee. In the interim (period) between 7th February, 1946 and 20th February, 1946, the yarn which was distributed to the handloom weavers was the subject of seizure by the Provincial Textile Commissioner and this the assessee sought to resist by filing an application under section 45 of the Specific Relief Act (I of 1877) * * *"

In the view of the Tribunal the company did not act in violation of the terms of the order dated 20th February, 1946 ; it cannot therefore be said that the company was seeking to protect itself against a criminal prosecution and the consequences arising from the infringement of the order dated 20th February, 1946.

It is true that in the judgment in appeal from the order refusing *mandamus*, Leach, C J, speaking for the Court observed (See *Sree Meenakshi Mills* v *Provincial Textile Commissioner, Madras*[3]) :

> "In spite of the fact that this order in effect prohibited the appellant delivering yarn to owners of handlooms situated outside the mill premises, the appellant continued to deliver yarn to such weavers, and"

the Judicial Committee observed :

> "Despite the prohibition the appellant continued to deliver yarn to such owners in order (as already mentioned) that they might turn the yarn into cloth and bring the article back to the mills" (See *Sree Meenakshi Mills, Ltd* v *Provincial Textile Commissioner, Mardas*[4])

1 (1954) 26 I T R 195 35 T C 367 (1954) 3 W L R 85. (1954) 2 All E R 413

2. (1953) S C.J 448 . (1953) 1 M L J. 849 : (1953) S.C.R. 714.

3 (1946) 2 M L J 188 A I R 1947 Mad 82

4 (1949) L R 76 I A 191, 195 (1949) 2 M L J 495 I L R. (1950) Mad. 679 : A.I.R. 1949 P C. 307.

But the Tribunal has observed in its order dismissing the appeal filed by the company that it was "not disputed before them" that after 20th February, 1946, the company did not distribute any yarn.

The question referred in this case must be decided not on what was found or observed by the High Court in appeal from the order in the proceedings under section 45 of the Specific Relief Act or by the Judicial Committee, but upon findings of fact recorded by the Tribunal It is unfortunate that the High Court took the facts not from the Statement of The Case, but apparently from the judgment of the Judicial Committee The High Court assumed that the company had contravened the law because it delivered yarn to weavers in contravention of the order dated 20th February, 1946 But the assumption on which the discussion is founded is erroneous.

The High Court also thought that expenditure to fall within the terms of section 10 (2) (*xv*) must be one for the purpose of earning income, and there was no material on the record to show that the expenditure was so incurred If it is intended thereby to imply that the primary motive in incurring the expenditure admissible to deduction under section 10 (2) (*xv*) must be directly to earn income thereby, we are with respect unable to agree with that view

This Court in *Commissioner of Income-tax, Kerala* v *Malayalam Plantations, Ltd.*[1], observed :

"The expression 'for the purpose of the business' is wider in scope than the expression 'for the purpose of earning profits' Its range is wide it may take in not only the day-to-day running of a business, but also the rationalization of administration and modernization of its machinery : it may include measures for the preservation of the business or for the protection of its assets and property from expropriation, coercive process or assertion of hostile title . it may also comprehend payment of statutory dues and taxes imposed as a precondition to commence or for carrying on of a business , it may comprehend many other acts incidental to the carrying on of a business."

Expenditure incurred to resist in a civil proceeding the enforcement of a measure —legislative or executive—which imposes restrictions on the carrying on of a business, or to obtain a declaration that the measure is invalid would, if other conditions are satisfied, be admissible, in our judgment, under section 10 (2) (*xv*) as a permissible deduction in the computation of taxable income

The appeals are therefore allowed The question referred is answered in the affirmative. The appellant-company will be entitled to its costs in this Court and the High Court. One hearing fee.

V. S ——— *Appeals allowed.*

## THE SUPREME COURT OF INDIA.

PRESENT :—J. C SHAH, V. RAMASWAMI AND V BHARGAVA, JJ.

Kantamani Venkata Narayana & Sons .. *Appellants**

*v.*

First Additional Income-tax Officer, Rajahmundry .. *Respondent.*

*Income-tax Act (XI of 1922), section 34—Reassessment—Notice—Clause under which notice is issued, whether should be specified—Duty of assessee to disclose material facts—Production of books of accounts or other evidence—Whether sufficient*

The assessee, a Hindu undivided family, was assessed to tax on income derived principally from money-lending In the course of proceedings for assessment of a private limited company styled "Motu Industries, Ltd ", the Income-tax Officer discovered that there was a large accretion to the wealth of the assessee which had not been disclosed in the proceedings for its assessment On 12th March, 1959, the Income-tax Officer issued a notice seeking to reopen the assessment for the year 1950-51 The assessee filed a return under protest On 14th March, 1960, the Income-tax Officer issued notice of reassessment for the year 1951-52 and on 19th December, 1960 the Income-tax Officer intimated the reasons that had prompted him to issue the notices of reassessment On 24th March,

1 (1964) 2 I T J 130 (1964) 2 S C J 338

* C As Nos. 154 to 65 of 1966. 27th October, 1966

1962, the Income-tax Officer issued notices under section 34 of the Indian Income-tax Act, 1922 for reassessment of income for the years 1940-41 to 1949-50 The assessee filed petitions in the High Court for writs of *prohibition* to refrain the Income-tax Officer from proceeding under the said notices. The petitions were rejected by a single Judge and his order was confirmed in appeal by a Division Bench. The assessee appealed with Special Leave to the Supreme Court,

*Held*, that it is not necessary or imperative that a notice under section 34 must specify under which of the two clauses, clause (*a*) or clause (*b*) of sub-section (1) of section 34, the notice is issued The main notice to be issued in a case under section 34 is the notice under section 22 (2) and section 34 merely authorises the issue of such a notice

It is clearly implicit in the terms of sections 23 and 34 that the assessee is under a duty to disclose fully and truly material facts necessary for the assessment of the year and that the duty is not discharged merely by the production of the books of accounts or other evidence It is the duty of the assessee to bring to the notice of the Income-tax Officer particular items in the books of account or portions of documents which are relevant Even if it be assumed that from the books produced the Income-tax Officer, if he had been circumspect, could have found out the truth, the Income-tax Officer may not on that account be precluded from exercising the power to assess income which had escaped assessment

Appeals by Special Leave from the Judgment and Order dated the 3rd February, 1965, of the Andhra Pradesh High Court in Writ Appeals Nos 117 to 128 of 1964.

*P. Ram Reddy*, Senior Advocate (*A. V. V. Nair*, Advocate, with him), for Appellants (in all appeals).

*S. V. Gupte*, Solicitor-General of India (*R. Ganapathy Iyer* and *R. N. Sachthey*, Advocates, with him), for Respondent (in all appeals)

The Judgment of the Court was delivered by

*Shah, J.*—M/s. Kantamani Venkata Narayana & Sons hereinafter referred to as "the assessee" is a Hindu undivided family, which was assessed to tax on income derived principally from money-lending. In the course of proceedings for assessment of a private limited company styled "Motu Industries, Ltd" the Income-tax Officer, Rajahmundry, discovered that there was a large accretion to the wealth of the assessee which had not been disclosed in the proceedings for its assessment . On 12th March, 1959, the Income-tax Officer issued a notice seeking to reopen the assessment for the year 1950-51. The assessee filed a return under protest. On 14th March, 1960, the Income-tax Officer issued notice of re-assessment for the year 1951-52, and on 19th December, 1960, the Income-tax Officer intimated the reasons that had prompted him to issue the notices of re-assessment. On 24th March, 1962, the Income-tax Officer issued notices under section 34 for reassessment of income of the assessee for the years 1940-41 to 1949-50. The assessee then presented petitions in the High Court of Andhra Pradesh for writ of *prohibition* directing the Income-tax Officer to refrain from proceeding in pursuance of the notices for the assessment years 1940-41 to 1949-50 and 1950-51 and 1951-52. A single Judge of the High Court rejected the petitions and the order was confirmed in appeal by a Division Bench of the High Court. The assessee has appealed with Special Leave.

The notice issued by the Income-tax Officer did not specifically refer to section 34 (1) (*a*) of the Income-tax Act; it did not set out the clause under which it was issued. But on that account the proceeding under section 34 is not vitiated. It was held by the Calcutta High Court in *P. R Mukherjee* v. *Commissioner of Income-tax, West Bengal*[1], that it is not necessary or imperative that a notice under section 34 must specify under which of the two clauses clause (*a*) or clause (*b*) of sub-section (1) of section 34 the notice is issued. The main notice to be issued in a case under section 34 is the notice under section 22 (2), and section 34 merely authorises the issue of such a notice.

The proceedings for re-assessment cover a period of 12 years : 1940-41 to 1951-52. Section 34 of the Income-tax Act has undergone some changes during that period, but the basic scheme of the section remained substantially the same Power to re-assess income under section 34 (1) as amended by Act VII of 1939 could be

1. (1956) 30 I.T.R. 535, A.I.R. 1956 Cal. 197.

exercised if "definite information" had "come into" the possession of the Income-tax Officer, and in consequence of such information it was discovered that income chargeable to tax had escaped assessment By the Income-tax and Business Profits Tax (Amendment) Act XLVIII of 1948, section 34 (1) was recast to read as follows :

"(1) If—

(*a*) the Income-tax Officer has reason to believe that by reason of the omission or failure on the part of an assessee to make a return of his income under section 22 for any year or to disclose fully and truly all material facts necessary for his assessment for that year, income, profits or gains chargeable to income-tax have escaped assessment for that year, or have been under-assessed, or assessed at too low a rate, * * * or

(*b*) notwithstanding that there has been no omission or failure as mentioned in clause (*a*) on the part of the assessee, the Income-tax Officer has in consequence of information in his possession reason to believe that income, profits or gains chargeable to income-tax have escaped assessment for any year, or have been under-assessed, or assessed at too low a rate, * * he may in cases falling under clause (*a*) at any time and in cases falling under clause (*b*) at any time within four years of the end of that year, serve on the assessee, * * * *a notice containing all or any of the requirements which may be included in a notice under sub-section (2) of section 22 and may proceed to assess or re-assess such income, profits or gains* * * *"

An *Explanation* was aso added which states :

"*Explanation* —Production before the Income-tax Officer of account books or other evidence from which material facts could with due diligence have been discovered by the Income-tax Officer will not necessarily amount to disclosure within the meaning of this section "

Since on the matter canvassed in these appeals there is no material change in the section, we will only refer to the section as amended by Act XLVIII of 1948.

This Court in *Calcutta Discount Company Ltd.* v. *Income-tax Officer, Companies District I, and another*[1], observed that before the Income-tax Officer may issue a notice under section 34 (1) (*a*) of the Indian Income-tax Act, two conditions precedent must co-exist , the Income-tax Officer must have reason to believe (1) that income, profits or gains had been under-assessed, and (2) that such under-assessment was due to non-disclosure of material facts by the assessee. The Court further held that where the Income-tax Officer has *prima facie* reasonable grounds for believing that there has been a non-disclosure of a primary material fact, that by itself gives him jurisdiction to issue a notice under section 34 of the Act, and the adequacy or otherwise of the grounds of such belief is not open to investigation by the Court.

In a recent judgment of this Court in *S Narayanappa and others* v *The Commissioner of Income-tax, Bangalore*[2], Ramaswami, J , speaking for the Court observed :

"* * *the legal position is that if there are in fact some reasonable grounds for the Income-tax Officer to believe that there had been any non-dislosure as regards any fact, which could have a material bearing on the question of under-assessment that would be sufficient to give jurisdiction to the Income-tax Officer to issue the notice under section 34 Whether these grounds are adequate or not is not matter for the Court to investigate In other words, the sufficiency of the grounds which induced the Income-tax Officer to act is not a justiciable issue It is of course open for the assessee to contend that the Income-tax Officer did not hold the belief that there had been such non-disclosure In other words, the existence of the belief can be challenged by the assessee but not the sufficiency of the reasons for the belief Again the expression 'reason to believe' in section 34 of the Income-tax Act does not mean a purely subjective satisfaction on the part of the Income-tax Officer The belief must be held in good faith it cannot be merely a pretence To put it differently it is open to the Court to examine the question whether the reasons for the belief have a rational connection or a relevant bearing to the formation of the belief and are not extraneous or irrelevant to the purpose of the section To this limited extent, the action of the Income-tax Officer in starting proceedings under section 34 of the Act is open to challenge in a Court of law "

It is clear from the affidavits filed in the Court of First Instance that the Income-tax Officer had received information relying upon which he had reason to believe that the assessee had not disclosed fully and truly all material facts necessary for the assessment and in consequence of non-disclosure of that information, income chargeable to tax had escaped assessment. In his affidavit, the Income-tax Officer stated :

1. (1963) 1 S C J 741 (1961) 2 S C.R 241 ; A.I.R. 1961 S.C 372.
2. (1967) 1 I.T J 120 (1967) 1 S C J 161.

" A scrutiny of the money-lending ' statements' filed by the assessee for the years ended 31st March, 1950 and 31st March, 1951 revealed that there were large investments made by the assessee in his money-lending business in those two years The assessee did not file balance-sheets for the said two years, or for the earlier assessment years and consequently it was not clear from the statements filed by him, how he could make heavy investments in money-lending business in those two years "

The Income-tax Officer also stated that in the year of account 1949-50 the total investments in money-lending business had increased by Rs 1,33,000 and in the following year by Rs 49,000 and the plea of the assessee that growth in the investments of the assessee in those years was mainly due to "the cash balance" held by the manager out of his share received on partition between him and his brothers, and cash gifts from his father-in-law which were till then kept uninvested even in the money-lending business, was not supported by any evidence, that the assessee had suppressed the account books for the periods prior to 1st April, 1949, and that the assessee had not produced the deed of partition relied upon According to the Income-tax Officer, the net wealth of the family on 1st April, 1937, inclusive of investments in the money-lending business was less than Rs 50,000 and the investments made by the assessee in money-lending business were approximately of the order of Rs 21,000, that the assessments made on the family from 1937-38 till 1948-49 showed that the assessee's aggregate income for those years was Rs 30,000, that taking into account the manager's professional income and the agricultural income of the assessee, the aggregate could not exceed Rs one lakh, and that possession of large wealth on 1st April, 1949, which was not explained justified him in inferring that there was escapement of assessment of huge income or in any event it had resulted in under-assessment on account of the failure of the assessee in not disclosing the material facts fully and truly for the assessment years 1940-41 to 1949-50.

The averments made by the Income-tax Officer in his affidavit which have been accepted by the Court of First Instance, *prima facie*, establish that the Income-tax Officer had reason to believe that by reason of the omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment, income chargeable to income-tax has escaped assessment.

It was urged on behalf of the assessee that year after year account books and statements of account were produced by the assessee before the Income-tax Officer, and the Income-tax Officer had computed the taxable income on the materials furnished no case for exercising the power of the Income-tax Officer under section 34 was made out, since power to re-assess may not be exercised merely because on the same evidence the Income-tax Officer or his successor entertains a different opinion In our view there is no force in this contention From the affidavit of the Income-tax Officer it clearly appears that there had been considerable increase since 1938 in the investments in the money-lending transactions of the assessee and in the wealth of the assessee The Income-tax Officer was not seeking to re-assess the income on a mere change of opinion The increase in the wealth discovered was wholly disproportionate to the known sources of income of the assessee That was *prima facie* evidence on which the reason to believe that the assessee had omitted to disclose fully and truly all material facts and that in consequence of such non-disclosure income had escaped assessment The Income-tax Officer has said that no attempt was made by the assessee to furnish some reasonable proof of the source of the additional wealth; the partition deed was not produced ; the books of account prior to 1948-49 were withheld on the plea that all the books were lost ; no evidence was tendered to show that the father-in-law of the manager was possessed of sufficient means to give and did give any large cash amounts to him ; and there was also no explanation why a large amount exceeding a lakh of rupees was not invested in the money-lending or other business

The Income-tax Officer had therefore *prima facie* reason to believe that information material to the assessment had been withheld, and that on account of withholding of that information income liable to tax had escaped assessment From the mere production of the books of account it cannot be inferred that there had been full disclosure of the material facts necessary for the purpose of assessment. The terms

of the *Explanation* are too plain to permit an argument being reasonably advanced, that the duty of the assessee to disclose fully and truly all material facts is discharged when he produces the books of account or other evidence which has a material bearing on the assessment. It is clearly implicit in the terms of sections 23 and 34 of the Income-tax Act that the assessee is under a duty to disclose fully and truly material facts necessary for the assessment of the year, and that the duty is not discharged merely by the production of the books of accounts or other evidence. It is the duty of the assessee to bring to the notice of the Income-tax Officer particular items in the books of account or portions of documents which are relevant. Even if it be assumed that from the books produced, the Income-tax Officer, if he had been circumspect, could have found out the truth, the Income-tax Officer may not on that account be precluded from exercising the power to assess income which had escaped assessment.

It was urged that since the High Court in appeal did not decide whether any primary facts on which the determination of the issue of reasonable belief in non-disclosure of material facts necessary for the assessment of the previous year and escapement of tax in consequence thereof depended were not disclosed, the judgment of the High Court should be set aside The learned Trial Judge has dealt with in detail the affidavits of both the assessee and the Income-tax Officer and has come to the conclusion that there was *prima facie* evidence of non-disclosure fully and truly of all material facts necessary for the assessment and on the materials placed before the Income-tax Officer he had reason to believe that as a consequence of that non-disclosure income had escaped assessment The High Court in appeal after referring to the judgment in *Calcutta Discount Company's case*[1], observed :

"* * without the enquiry being held by the concerned Income-tax Officer it is not possible, on the material on record, to decide whether or not the assessee omitted to or failed to disclose fully and truly all material facts necessary for his assessment for the respective years"

The High Court has pointed out that no final decision about failure to disclose fully and truly all material facts bearing on the assessment of income and consequent escapement of income from assessment and tax could be recorded in the proceedings before them It certainly was not within the province of the High Court to finally determine that question The High Court was only concerned to decide whether the conditions which invested the Income-tax Officer with power to re-open the assessment did exist, and there is nothing in the judgment of the High Court which indicates that they disagreed with the view of the Trial Court that the conditions did exist.

These appeals therefore fail and are dismissed with costs There will be one hearing fee,

T.K.K. —— *Appeals dismissed.*

## THE SUPREME COURT OF INDIA

PRESENT:—J. C. SHAH, V. RAMASWAMI AND V. BHARGAVA, JJ.

S. Srinivasan, Erode .. *Appellant**

*v.*

Commissioner of Income-tax, Madras .. *Respondent.*

*Income-tax Act (XI of 1922), section 16 (3) (a) (i) and (ii)—Firm—Assessee, his wife and stranger partners—Two minor sons of assessee also admitted to benefits of partnership—Interest on accumulated profits of wife and minor sons—Whether includible in the assessment of the assessee*

The appellant was a senior partner in a firm in which the two other partners were his wife and a stranger In addition, two minor sons of the appellant were admitted to the benefits of the partnership. In one of the clauses of the partnership deed it was provided that "if the firm requires any sum for meeting the expenses for its management and if any of the partners has and is willing to give such amount, he may advance (such amount) as loan He may receive interest for such sum at the rate

1. (1963) 1 S.C.J. 741 : (1961) 2 S.C.R. 241 : A.I.R. 1961 S.C. 372.

* C.A. No. 556 of 1965. 4th October, 1966.

of 12 annas per cent per mensem" Up to the beginning of the previous year relevant to the assessment year 1957-58 the profits that were accumulating in the accounts to the credit of the wife and the two minor sons of the appellant were kept without any interest With effect from the previous year in question, the partnership decided to allow interest at 9 per cent per annum on these accumulated profits The Income-tax Officer added the interest on accumulated profits ofthe wife and minor sons to the income of the appellant for purposes of assessment under section 16 (3) (*a*) (i) and (ii) of the Indian Income-tax Act, 1922 On appeal the Appellate Assistant Commissioner held in favour of the appellant The Tribunal on further appeal, held that the amount of interest credited to the account of the minors in respect of capital provided by the grandfather and grandmother had to be excluded from the total income of the appellant while the interest earned on the accumulated profits was rightly included in the income of the appellant On reference, the High Court answered the question against the appellant On appeal to the Supreme Court,

*Held*, that the interest at least indirectly arose and accrued to the wife and the minor sons because of their capacity mentioned in section 16 (3) (*a*) (i) and (ii) and was therefore includible in the assessment of the appellant

The cases where interest is earned on a deposit or a loan differ from a case where interest wa earned on amounts of which the minors permitted the use by the firm, because they were their accumulated profits arising from the firm itself and because of their interest in the firm as persons admitted to the benefits of the partnership

Appeal by Special Leave from the Judgment and Order dated the 27th day of August, 1962, of the High Court of Madras in T.C. No 82 of 1960.

*A.K. Sen*, Senior Advocate (*R Gopalakrishnan*, Advocate, with him), for Appellant.

*S T Desai*, Senior Advocate (*A N. Kirpal* and *R N. Sachthey*, Advocates, with him), for Respondent.

The Judgment of the Court was delivered by

*Bhargava, J*—The appellant is a senior partner in a firm in which the two other partners are his wife and a stranger In addition, two minor sons of the appellant were admitted to the benefits of the partnership Under the deed of agreement constituting the partnership, the shares in the profits of all the five persons were defined There was also specification of the shares in which losses were to be shared by the three partners There was a clause in the deed of partnership that "if the firm requires any sum for meeting the expenses for its management and if any of the partners has and is willing to give such amount, he may advance (such amount) as loan He may receive interest for such sum at the rate of 12 annas per cent per mensem" The firm earned profits which were distributed in accordance with their shares between the three partners and the two minors who were admitted to the benefits of the partnership The amounts of profit falling to the share of the wife of the appellant and his two minor sons were allowed to accumulate in the accounts of the partnership for a number of years. Up to the beginning of the previous year relevant to the assessment year 1957-58, the profits that were accumulating in the accounts to the credit of the wife and the two minor sons of the appellant were kept without any interest. With effect from the previous year in question, the partnership decided to allow interest at 9 per cent per annum on these accumulated profits, so that, during this previous year, the amounts to the credit of these three persons increased on account of two additions in each case There was addition of further profit falling to their share and there was added interest on the opening balance of the accumulated profits in the accounts of each one of these three persons. All these amounts added to the accounts during the previous year in respect of the share of profits as well as interest on accumulated profits were added to the income of the appellant for purposes of assessment under section 16 (3) (*a*) (i) and (ii) of the Income-tax Act. These additions were challenged by the appellant on two different grounds. The first ground was that the provisions of section 16 (3) (*a*) (i) and (ii) were *ultra vires* as being beyond the legislative powers of Parliament The second ground was that, even on the application of these provisions, at least the amount added to the income of the appellant in respect of the interest credited in the accounts of his

wife and minor sons was not justified in law. Both these objections were overruled by the Income-tax Officer. On appeal, the Appellate Assistant Commissioner upheld the decision of the Income-tax Officer on the first point, but decided the second point in favour of the appellant and held that the interest earned by his wife and minor sons from the firm could not be included in the income of the appellant for purposes of charging it with income-tax. The Income-tax Appellate Tribunal, on further appeal, again upheld the decision on the first question, but, on the second question, partly rejected the claim of the appellant. The Tribunal held that the amount of interest credited to the account of the minors in respect of capital provided by their grandfather and grandmother had to be excluded from the total income of the assessee, while the interest earned on the accumulated profits was rightly included in the income of the appellant. Thereupon, at the request of the appellant, the following two questions were referred by the Tribunal for the opinion of the Madras High Court:

"(i) Whether the provisions of section 16 (3) (*a*) (i) and (ii) offend clauses (*f*) and (*g*) of Article 19 (1) of the Constitution of India?

(ii) Whether interest credited by the aforesaid firm to the assessee's wife and minor children attributable to past profit accumulations only is includible in the assessment of the assessee under section 16 (3) (*a*) (i) and (ii)?"

The High Court answered both the questions against the appellant, and consequently, he has come up to this Court by Special Leave.

So far as the first question is concerned, learned Counsel appearing for the appellant himself did not press it before us in view of the decision of this Court in *Balaji* v. *Income-tax Officer, Special Investigation Circle, Akola, and others*[1]. That point was earlier decided by the Madras High Court in *B. N. Amina Umma* v. *Income-tax Officer, Kozhikode*[2]. It has been held by this Court in *Balaji's case*[1], that the provisions of section 16 (3) (*a*) (*i*) and (*ii*) did not impose any unreasonable restriction on the fundamental rights of the assessee under Article 19 (1) (*f*) and (*g*) of the Constitution and were consequently, valid. The first question has, therefore, been clearly answered correctly by the High Court against the appellant.

Learned Counsel appearing for the appellant mainly argued before us the second question and urged that though the profits earned from the partnership by the wife and the minor sons of the appellant were undoubtedly income arising to them directly from the partnership of the wife in the firm or the admission of the minors to the benefits of the partnership in the firm, the interest accruing on the accumulated profits should not be held to arise either directly or indirectly from the same source. The argument was that the accumulated profits belonging to the wife and the minor sons should be held to be in the nature of deposits made by them with the firm, or in the nature of loans advanced by them to the firm, and interest earned on such deposits or loans can have no relationship with the membership of the firm of the wife or the admission to the benefits of the partnership of the minor sons. It appears to us that these accumulated profits remaining in the hands of the firm cannot, on any principle, be equated with deposits made or loans advanced. The profits accumulated to the credit of the wife and the minor sons, because they did not draw their share of profits when distribution of profits took place, and allowed these profits to remain with the firm; but there is no suggestion at all that, at that stage, either the wife or the minor sons, or anyone on their behalf, purported to enter into an arrangement with the firm to keep these accumulated profits as deposits. Similarly, there was no such contract which could convert those accumulations into loans advanced to the firm by these persons. The facts and circumstances indicate that the wife and the minor sons had earned these profits because of their membership of the firm or because of their admission to the benefits of the firm, and having earned these profits in that capacity, they allowed the use of their profits to the firm without any specific arrangement as would naturally have been entered into if these funds had belonged to a

1. (1961) 1 S.C.J. 376: (1962) 2 S.C.R. 983: A.I.R. 1962 S.C. 123.

2. (1955) 2 M.L.J. 393: I.L.R. (1955) Mad. 702: A.I.R. 1954 Mad. 1120.

stranger. They let the firm use funds of theirs, because they had interest in the profits of the firm The facts also show that the use of these moneys was allowed to the firm without asking for any interest, and it was only at a later stage that the three partners of the firm decided to give interest on these amounts. When the decision was taken to give interest, the nature of the funds did not change. They did not get converted into deposits or loans They still remained accumulations belonging to a partner or persons admitted to the benefits of the partnership and allowed to be used by the firm. The interest also appears to have been allowed by the firm simply because these funds belonged either to a partner or to the minors who had been admitted to the benefits of the partnership It is thus clear that the interest at least indirectly arose and accrued to the wife and the minor sons because of their capacity mentioned in section 16 (3) *(a)* *(i)* and *(ii)* of the Income-tax Act.

In this connection, learned Counsel for the appellant relied on a decision of the Bombay High Court in *Bhogilal Laherchand* v *Commissioner of Income-tax, Bombay City*[1]. It was held in that case that interest earned by minors on deposits maintained in the firm could not be held to be a benefit which the minors received from their admission to the partnership of the firm The case is inapplicable, because, as we have indicated above, in this case the interest arising to the wife and the minor sons of the appellant was not the result of any deposits made by them with the firm.

*Chouthmal Kajriwal* v. *Commissioner of Income-tax, Assam*[2], and *Akula Venkatasubbiah* v. *Commissioner of Income-tax*,[3], were cases where interest was paid to the minors on the capital provided by them for the business of the partnership. In those cases, it was held that the interest on the capital contributed by the minor sons was benefit arising from the admission of the minors to the benefits of the partnership, and consequently, that interest had to be included in the total income of the father in his assessment These two cases are of no assistance, because the nature of the amount on which interest has accrued to the wife and the minor sons of the appellant is different and is not on capital advanced by them or on their behalf.

Reference was also made by learned Counsel to a decision of the Allahabad High Court in *L Ram Narain Garg* v. *Commissioner of Income-tax, U P.*[4], in which case also it was held that interest paid to a minor son admitted to the benefits of a partnership on his capital investment is income derived directly or indirectly by him from the admission and is includible in the income of the father under section 16 (3) *(a)* *(ii)* of the Income-tax Act It was further held that it cannot be stated as a matter of law that interest paid by a partnership to a minor admitted to its benefits can never be said to be connected even indirectly with the fact of his admission. It is connected with the fact if the interest paid is on capital investment by the minor or on a loan advanced to the partnership by the minor and the partnership deed forbids the raising of a loan from any person other than a partner or a person admitted to its benefits It is not connected with the fact if the interest is paid on a deposit made, or loan advanced by the minor, and the partnership was free to accept a deposit or a loan from any person even if not connected with it The principle enunciated by the Allahabad High Court does not envisage all circumstances in which interest may be earned by a minor on his moneys with the firm The cases where interest is earned on a deposit or a loan differ from a case of the type before us where interest was earned on amounts of which the minors permitted the use by the firm, because they were their accumulated profits arising from the firm itself and because of their interest in the firm as persons admitted to the benefits of the partnership. In the circumstances, the answer returned by the High Court to the second question was also correct. The appeal fails and is dismissed with costs.

T K K. *Appeal dismissed.*

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1 I L R (1954) Bom 1093 · 56 Bom L R· 718 · A I R 1955 Bom 16
2. (1961) 41 I T.R. 570.
3 (1963) 47 I T R 458.
4 (1965) 55 I T R. 435.

# THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction)

PRESENT :—J. C. SHAH, V. RAMASWAMI AND V. BHARGAVA JJ.

M/s. O. RM. M. SP. SV. Firm .. *Appellant**

*v.*

Commissioner of Income-tax, Madras .. *Respondent.*

*Income-tax Act (IX of 1922), section 25—Discontinuance—Business charged to tax under the 1918 Act—Exemption—Assessee, firm—Business in India and outside India—Profits of foreign business—Receipt—Taxed under the 1918 Act—Dissolution of firm—Foreign business and rental income from houses owned by foreign firm—Relief on discontinuance—Allowable. —Receipt of income derived from foreign business—Charge under the 1918 Act—Amounts to assessment on foreign business—Business, profession or vocation—Not a unit of assessment—Charge on the owner of the business—Exemption on discontinuance—General—Not restricted to the head "profit, and gain of business"—Division into various heads only for computation—Rental income from property owned by foreign firm—Relief on discontinuance—Tenable*

A Hindu undivided family, carrying on business in money-lending in India and outside India was assessed under the 1918 Act in respect of the receipt of the profits of the foreign business. On a partition and constitution of a partnership (the assessee) between the divided members of the family in the year 1938, a claim was made in the assessment year 1939-40 under section 25 (3) and (4) of Act of 1922 in respect of the period from 13th April, 1938 to 2nd June, 1938 In reference the High Court rejected the claim on the basis that there was no discontinuance of the business but only succession. On the dissolution of the assessee-firm on 2nd March, 1952, a claim for relief under section 25 (3) was made for the assessment year 1952-53, in respect of the income from foreign business and the rental income from house properties owned by the foreign firm The High Court n reference held that as the foreign business cannot be deemed to have been charged under 1918 Act because the assessee was only taxed on remittances received from the profits of the foreign business, section 25 (3) was not attracted. The assessee appealed

*Held*, that the assessee is entitled to both the parts of the relief contemplated under section 25 (3) of the Act in respect of the foreign business and is also entitled to relief under section 25 (3) with regard to rental income from house properties owned by the foreign firm which was discontinued in the year of assessment.

Where the entire income of the foreign business was remitted to the assessee and tax imposed on that income under the 1918 Act, the foreign business of the assessee must be held to be charged under the provisions of 1918 Act within the meaning of section 25 (3) of Act of 1922 It is manifest that by section 3 of the 1918 Act the charge was made on the receipt of income in British India and as the income received by the assessee was derived from the foreign business and was in relation to the foreign business it must be taken that there was an assessment to tax on the foreign business within the meaning of section 25 (3) of the Act of 1922.

Tax is charged under the Income-tax Acts on specific units such as, individuals, Hindu undivided family, companies, local authorities, firms and association of persons, etc , and business, profession or vocation is not a unit of assessment. When, therefore, section 25 (3) enacts that tax was charged at any time on any business, it is intended that the tax was at any time charged on the owner of the business. If that condition be fulfilled in respect of the income of business under 1918 Act, the owner or his successor-in-interest in relation to the business will be entitled to get the benefit of the exemption under it if the business is discontinued.

The exemption under section 25 (3) is general and there is no reason to restrict the condition of the applicability only to income on which the tax was payable under the head "profits, and gains of business, profession or vocation " The heads of income described in section 6 of the 1922 Act and further elaborated for the purpose of computation in sections, 7 to 10 and 12, 12-A, 12-AA and 12-B are intended merely to indicate the classes of income the heads do not exhaustively delimit sources from which income arises. Business income is broken up under different heads only for the purpose of computation of total income. By that breaking up the income does not cease to be

* C.A. No. 751 of 1965. 14th October, 1966.

the income of the business. The assessee is entitled to relief with regard to the rental income from the house properties owned by the foreign firm which was discontinued

Appeal from the Judgment and Order dated the 18th December, 1962, of the Madras High Court in Tax Case No. 143 of 1960.[1]

*A. K. Sen*, Senior Advocate (*K. Parasaran, K. Rajinder Chaudhuri* and *K. R. Chaudhuri*, Advocates, with him), for Appellant.

*B. Sen*, Senior Advocate, (*T. A. Ramachandran*, Advocate, and *S. P. Nayar*, Advocate, for *R. N. Sachthey*, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

*Ramaswami, J.*—This appeal is brought by certificate against the judgment of the Madras High Court dated 18th December, 1962 in T.C. No. 143 of 1960[1].

The appellant (hereinafter called the " assessee ") was a firm called O RM. M. SP. SV. Firm which was registered under section 26-A of the Income-tax Act, 1922, (hereinafter called the "1922 Act"). Prior to the constitution of the firm, the partners were members of a Hindu undivided family. The family which consisted of Meyyapa Chettiar and his two brothers carried on money-lending business in India and in the former Federated Malaya States and it was assessed under the Indian Income-tax Act, 1918 (hereinafter called the "1918 Act".) There was a disruption of the joint family status on 2nd June, 1938, and thereafter the members of the family continued the business as partners. In the course of the assessment for the year 1939-40 it was claimed by Meyyappa Chettiar, one of the members of the family that having regard to the severance of joint family status, the income of the family, from 13th April, 1938 to 2nd June, 1938, was not liable to be taxed by reason of the provisions of section 25 (3) and (4) The Income-tax Officer accepted the fact of partition amongst the members for the family, but rejected the contention that the family was not liable to pay tax on the profits of the said period. The High Court ultimately called for a reference on the following question :

" Whether the income of the family from 13th April, 1938 to 2nd June, 1938 is not liable to be taxed by virtue of section 25 (3) of the Indian Income-tax Act."

After receipt of the reference the High Court held that there was no discontinuance of the business within the meaning of section 25 (3). The view taken by the High Court was that when a Hindu undivided family carrying on a business, which was taxed under the 1918 Act, became disrupted and the members continue the business thereafter as partners, there could be no discontinuance but only succession by the firm of the business of the family. It was held in that case that it was the assessee-firm which took over the business of the Hindu undivided family. The firm was dissolved on 2nd March, 1952. In the assessment for the year 1952-53 the assessee applied for relief under section 25 (3) of the 1922 Act. The claim was rejected by the Income-tax Officer on 7th March, 1956. The assessee preferred an appeal to the Appellate Assistant Commissioner who dismissed the appeal holding that in the case of business carried on in foreign territory the business as such is not assessed under section 3 of the 1918 Act but only receipt of the income in British India is assessed and it cannot therefore be held that the foreign business of the appellant was charged to tax under the 1918 Act. The assessee took the matter in further appeal to the Appellate Tribunal which considered that the assessee was entitled to relief under section 25 (3) of the 1922 Act except for the income received from the house properties in Malaya The Appellate Tribunal accordingly allowed the appeal of the assessee in part. Both the assessee and the Department applied to the Appellate Tribunal for reference of the questions of law to the High Court. The Appellate Tribunal allowed the applications and stated a case to the High Court on the following questions of law :

"(i) Whether the assessee is entitled to both the parts of the relief contemplated under section 25 (3) of the Act in respect of foreign business at Penang, Ipoh and Kambar ?

(ii) Whether the applicant is also entitled to relief under section 25 (3) of the Act with regard to rental income from house properties owned by the foreign firm which was discontinued in the year of assessment."

1. (1963) 2 M.L.J. 267: (1963) 2 I.T.J. 152.

The Appellate Tribunal also referred another question for the opinion of the High Court but it is not the subject-matter of the present appeal.

The High Court, held that the assessee was not entitled to relief under section 25 (3) of the 1922 Act and accordingly answered both the questions in favour of the Department. The view taken by the High Court was that the foreign business of the assessee cannot be deemed to have been charged under the provisions of the 1918 Act because the assessee was only taxed on remittances received from the profits of the foreign business and there was no tax on the foreign business itself under the 1918 Act The High Court accordingly reached the conclusion that the assessee was not entitled to relief under section 25 (3) of the 1922 Act.

Section 25 (3) of the 1922 Act is to the following effect:

"25. (3) Where any business, profession or vocation on which tax was at any time charged under the provisions of the Indian Income-tax Act, 1918 (VII of 1918), is discontinued, then, unless there has been a succession by virtue of which the provisions of sub-section (4) have been rendered applicable no tax shall be payable in respect of the income, profits and gains of the period between the end of the previous year and the date of such discontinuance, and the assessee may further claim that the income, profits and gains of the previous year shall be deemed to have been the income, profits and gains of the said period Where any such claim is made, an assessment shall be made on the basis of the income, profits and gains of the said period, and if an amount of tax has already been paid in respect of the income, profits and gains of the previous year exceeding the amount payable on the basis of such assessment, a refund shall be given of the difference"

Under this section exemption from liability to pay tax in respect of the income, profits and gains may be claimed by an assessee if the business is one in respect of which tax was charged at any time under the 1918 Act, and the business is discontinued—there being no succession by virtue of which the provisions of sub-section (4) of section 25 have been rendered applicable Section 25 (3), however, applies even if the person assessed under the 1918 Act was different from the person who claims relief under that section provided the former was the predecessor-in-interest of such person in relation to the business. The reason for enacting section 25 (3) was that under the 1918 Act, income-tax was levied by virtue of section 14 (2) of the 1918 Act, on the income of the year of assessment Tax was, therefore, levied in the financial year 1921-22 on the income of that year By the 1922 Act the basis of taxation was altered and by section 3 of that Act, charge for tax was imposed upon the income of the previous year. When the 1922 Act was brought into force on 1st April, 1922, two assessments in respect of the same income for the year 1921-22 had to be made. The income for 1921-22 was accordingly charged to tax twice; it was charged under the 1918 Act and it was also charged to tax under section 3 of the 1922 Act read with the appropriate Finance Act, resulting in double taxation in respect of the income for that year. But with a view to make the number of assessments equal to the number of years during which the business was carried on the Legislature enacted the exemption prescribed by section 25 (3) This benefit was however restricted only to the income, profits and gains of business, profession or vocation on which tax had been charged under the provisions of the 1918 Act. By enacting section 25 (3) the Legislature intended to exempt the income, profits and gains resulting from the activity styled business, profession or vocation from tax when the business, profession or vocation is discontinued if tax was charged in respect thereof under the 1918 Act.

The first question to be considered in this appeal is whether the assessee is entitled to both parts of relief contemplated under section 25 (3) of the 1922 Act in respect of the foreign business at Penang, Ipoh and Kambar. The controversy between the parties turns on the question whether the foreign business of the assessee was at any time charged under the provisions of the 1918 Act. It has been found by the Appellate Tribunal that the assessee was taxed on remittances received from and out of the profits of the foreign business. The finding of the Appellate Assistant Commissioner is stated in these terms:

"The entire profits of the foreign business came to be assessed in the hands of the appellant under the 1918 Act, not because it was a business income but because such income had been remitted into British India. Therefore, in fact also it is not the foreign profits of a business that has been charged to tax but only the remittance which in the particular case was not less than the profits of the year."

We have therefore to proceed on the footing that the assessee received the entire profits of the foreign business in British India and the entire profits were assessed to income-tax in the hands of the assessee under the 1918 Act. It is necessary, at this stage, to set out the relevant provisions of the 1918 Act.

Section 3, the charging section stated as follows :

" 3 (1) Save as hereinafter provided, this Act shall apply to all income from whatever source it is derived, if it accrues or arises or is received in British India, or is, under the provisions of this Act, deemed to accrue or arise or to be received in British India.

.................................."

Section 5 mentioned the classes of income chargeable to income-tax and reads as follows :

" 5. Save as otherwise provided by this Act, the following classes of income shall be chargeable to income-tax in the manner hereinafter appearing, namely—

(i) Salaries.

(ii) Interest on securities.

(iii) Income derived from house property.

(iv) Income derived from business.

(v) Professional earnings

(vi) Income derived from other sources".

Section 9 of the 1918 Act enumerated the permissible deductions in the computation of the profits of the business The question for determination is whether the foreign business of the assessee was at any time charged under the provisions of section 3 of the 1918 Act. It has been found in this case that the entire income of the foreign business was remitted to the assessee and tax imposed on that income under the 1918 Act. We are of the opinion that in the context of these two facts the foreign business of the assessee must be held to be charged under the provisions of the 1918 Act within the meaning of section 25 (3) of the 1922 Act. It is manifest that by section 3 of the 1918 Act the charge was made on the receipt of income in British India and as the income received by the assessee was derived from the foreign business and was in relation to the foreign business it must be taken that there was an assessment to tax on the foreign business within the meaning of section 25 (3) of the 1922 Act. In other words, the tax under the 1918 Act was charged upon the assessee in respect of his activity styled "foreign business" and in relation to it and it must be hence taken, upon the facts found by the Appellate Tribunal in this case, that the foreign business of the assessee was charged under the 1918 Act within the meaning of section 25 (3) of the 1922 Act. The High Court has taken the view that the foreign business of the assessee was not charged under the 1918 Act because what was taxed was the remittances received by the assessee from the foreign business and not the foreign business itself. In taking this view, the High Court has followed its previous decision in *Commissioner of Income-tax, Madras* v. *S.V.R M. Palaniappa Chettiar & others*[1] in which it was held that the words " on which" in section 25 (4) of the 1922 Act cannot be interpreted as meaning " with reference to which" and that in order to claim and avail the benefit under section 25 (4) the tax clearly should be charged on the business as such under the 1918 Act. At page 173 of the report, Satyanarayana, Rao, J., stated as follows :—

" The relief under sub-clause (4) is permissible only if the tax on the business was charged under the provisions of the Indian Income-tax Act, 1918 If the foreign business at Muar was not and could not have been charged under the Act and the share in the profits of the family from that foreign business was charged under section 3 only on the receipt in British India, can it be said that the charge so made was a charge of a tax on the foreign business. The income received by the joint family could not have been charged under the head ' income derived from business ' but only as a receipt under section 3. The argument, however, on behalf of the assessee by his learned Advocate Mr. Rajah Iyer was that the words ' on which tax was at any time charged ' should be construed as meaning ' with reference to which tax was at any time charged.' In other words, the contention is that the income derived by the assessee was in relation to a business and therefore the assessment of the income must be treated as an assessment of the business. No doubt, under the provisions of the Income-tax Act, the tax is payable by an assessee but the assessment of the tax is on the basis of various heads of income derived by the assessee one of which is business. It cannot, therefore,

1. (1951) 2 M.L.J. 202 ; I.L R (1952) Mad. 211: 30 I.T.R. 170 (173).

be said that because tax was payable by the assessee on the profits received from a business in a foreign territory such assessment is an assessment of the business."

In our opinion, the view adopted by the High Court in *Commissioner of Income-tax, Madras* v. *S V R M Palaniappa Chettiar & others*[1] must be taken to be impliedly overruled by the recent decision of this Court in *Commissioner of Income-tax, Bombay City I* v. *Chugandas & Co* [2] in which the question was whether the interest on securities formed part of the assessee's business income for the purpose of the exemption from tax under section 25 (3) of the 1922 Act. It was held by this Court that the assessee was entitled to exemption under section 25 (3) in respect of interest on securities as well, and there was no reason to restrict the condition of the applicability of the exemption under section 25 (3) only to income on which the tax was payable under the head "Profits and gains of business, profession or vocation" It was further observed in that case that tax is charged under the Income-tax Acts on specific units, such as, individuals, Hindu undivided families, companies, local authorities, firms and associations of persons, etc., and business, profession or vocation is not a unit of assessment. When, therefore, section 25 (3) enacts that tax was charged at any time on any business, it is intended that the tax was at any time charged on the owner of any business If that condition be fulfilled in respect of the income of the business under the 1918 Act, the owner or his successor-in-interest in relation to the business, will be entitled to get the benefit of the exemption under it if the business is discontinued We are accordingly of the opinion that the High Court was in error in holding that the foreign business of the assessee was not charged under the provisions of the 1918 Act The first question must therefore be answered in favour of the assessee and it must be held that the assessee is entitled to both parts of relief contemplated under section 25 (3) of the 1922 Act in respect of the foreign businesses at Penang, Ipoh and Kambar.

The second question of law arising in this appeal is whether the assessee was entitled to relief under section 25 (3) of the 1922 Act with regard to the rental income from house properties owned by the foreign firm which was discontinued in the year of account A similar question was the subject-matter of consideration in *Commissioner of Income-tax, Bombay City I* v *Chugandas & Co* [2] which has already been referred to In that case, the assessee-firm, a dealer in securities holding securities as its stock-in-trade, had been charged to tax under the 1918 Act, in respect of business. It received Rs 4,13,992 and Rs 1,01,229 as interest on securities in the years 1946 and 1947 respectively The firm discontinued its business on 30th June, 1947. The question at issue was whether the interest on securities formed part of the assessee's business income for the purpose of the exemption from tax under section 25 (3) of the 1922 Act. It was held by this Court that the assessee was entitled to exemption under section 25 (3) in respect of interest on securities as well It was pointed out that there was no reason to restrict the condition of the applicability of the exemption under section 25 (3) only to income on which the tax was payable under the head "profits and gains of business, profession or vocation" The exemption under section 25 (3) is general It was explained by this Court that the heads of income described in section 6 of the 1922 Act, and further elaborated for the purposes of computation in sections 7 to 10 and 12, 12-A, 12-AA and 12-B, are intended merely to indicate the classes of income. The heads do not exhaustively delimit sources from which income arises Business income is broken up under different heads only for the purpose of computation of the total income. By that breaking up the income does not cease to be the income of the business, the different heads of income being only the classification prescribed by the Income-tax Act for computation The ratio of this decision applies to the present case and it must accordingly be held that the assessee is entitled to relief under section 25 (3) of the 1922 Act with regard to the rental income from the house properties owned by the foreign firm which was discontinued in the year of account.

1. (1951) 2 M.L J. 202 : I.L R. (1952) Mad 211.
2. (1964) 2 I.T.J. 781 : (1965) 1 S C J. 49.

For these reasons the judgment of the Madras High Court is set aside and this appeal must be allowed with costs.

V.S. ——— *Appeal allowed.*

(Civil Appellate Jurisdiction)

PRESENT:—J.C. SHAH, V RAMASWAMI AND V. BHARGAVA, JJ

S. S. Rajalinga Raja ... *Appellant**

*v.*

The State of Madras .. *Respondent.*

*Madras Plantations Agricultural Income-tax Act, (V of 1955), sections 3, 4, 65—scope—Agricultural income-tax—Sale of produce of earlier years in the year of account—Income derived, whether exempt—Tax for those years paid after composition—Produce of those years, whether had suffered tax*

For the assessment year 1957-58, the appellant submitted a return disclosing a net agricultural income of Rs 5,250 from his cardamom plantation On enquiry the Agricultural Income-tax Officer learnt that the appellant had sold stocks of cardamom of the value of Rs 58,375-9-9 between 1st April, 1956 and 31st March, 1957. The appellant explained that those sales represented not the produce of the year of account but accumulated stocks of the past three to four years. That explanation was rejected by the Agricultural Income-tax Officer and after allowing expenditure estimated at the rate of Rs 120 per acre the balance was brought to tax and a penalty of Rs 3,000 was levied. The order was confirmed by the Appellate Assistant Commissioner But the Tribunal was of the view that the average production of cardamom per acre was 40 lbs , and that if the stock of cardamom sold in the year of assessment be attributed to production of the year, the yield would approximately be 134 lbs per acre Holding that an estimate of 40 lbs. per acre would be a " fair estimate" and that an average expenditure of Rs 145 per acre should be allowed, the Tribunal directed that the assessment be modified and the order imposing penalty be set aside The High Court, on revision, rejected the contention of the appellant that the income from sales of cardamom stock of previous years was not taxable in the year of account because it had been subjected to tax in those previous years under orders compounding the tax under section 65 of the Madras Plantations Agricultural Income-tax Act, 1955 and restored the assessment made by the Agricultural Income-tax Officer On appeal to Supreme Court,

*Held*, that merely because the produce of the plantation was received in the earlier years, assuming that the appellant's case was true, income derived from sale of that produce in the year of account was not exempt from tax under the Act, in that year.

From the mere fact that the appellant did not submit returns of income for the years 1955-1956 and 1956-1957 but applied to compound the tax under section 65 of the Act, and paid the tax determined at the rates specified in Part II of the Schedule to the Act, it could not be inferred that the produce which was sold by him in the year of account had suffered tax in the earlier years.

It is not necessary for income to accrue that there must be a sale of a commodity, consumption by use of a commodity in the business of the assessee from which the assessee obtains benefit of the commodity may be deemed to give rise to income.

Section 3 of the Act read with the definition of "agricultural income" charges to tax the monetary return either as rent or revenue or agricultural produce from the plantation The expression "income" in its normal connotation does not mean mere production or receipt of a commodity which may be converted into money. Income arises when the commodity is disposed of by sale consumption or use in the manufacture or other processes carried on by the assessee *qua* that commodity There is no reason to think that the expression " income " in the Act has any other connotation A tax on income whether agricultural or non-agricultural, is, unless the Act provides otherwise, a tax on monetary return, actual or notional Section 4 of the Act supports that view, for in the total agricultural income is comprised all agricultural income derived from a plantation in the State.

Appeals by Special Leave from the Judgments and Orders dated the 12th November, 1962, and 1st January, 1964, of the Madras High Court in Tax Case No. 19 of 1961 and S.C. Petition No. 142 of 1963 respectively.

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* C.As. Nos. 979 and 980 of 1965. 26th October, 1966.

*S. Swaminathan* and *R. Gopalakrishnan*, Advocates, for Appellant.

*P. Ram Reddy*, Senior Advocate (*A. V. Rangam*, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

*Shah, J.*—S. S. Rajalinga Raja—hereinafter called " the appellant "—owns a cardamom plantation on a fifty-acre estate. For the assessment year 1957-58 he submitted a return under the Madras Plantations Agricultural Income-tax Act V of 1955 disclosing a net income of Rs 5,250 from the plantation On enquiry the Agricultural Income-tax Officer learnt that the appellant had sold stocks of cardamom of the value of Rs. 58,375-9-9 between 1st April, 1956 and 31st March, 1957. The appellant explained that those sales represented not the produce of the year of account, but accumulated stocks of the past 3 to 4 years That explanation was rejected by the Agricultural Income-tax Officer and after allowing expenditure estimated at the rate of Rs. 120 per acre, the balance was brought to tax, and a penalty of Rs. 3,000 was levied under section 20 (1) (*c*) of the Act. The order was confirmed in appeal to the Appellate Assistant Commissioner, both as to the levy of tax and penalty. But the Appellate Tribunal was of the view that the average production of cardamom per acre was 40 lbs. and that if the stocks of cardamom sold in the year of assessment be attributed to production of the year, the yield would approximately be 134 lbs. per acre. Holding that an estimate of 40 lbs per acre would a "fair estimate" and that an average expenditure of Rs. 145 per acre should be allowed, the Tribunal directed that the assessment be modified, and the order imposing penalty be set aside.

The State of Madras then applied to the High Court of Madras in revision The High Court was of the view that a part of the stock of cardamom sold in the year, though not the whole, was probably accumulated stock out of previous year's production, but since the appellant did not lay before the taxing authorities reliable evidence, his explanation was rightly rejected. The High Court also rejected the contention of the appellant that the income from sales of cardamom stock of previous years was not taxable in the year of account because it had been subjected to tax in those previous years under orders compounding the tax under section 65 of the Act. The High Court accordingly allowed the petition and restored the assessment made by the Department. With Special Leave, the appellant has appealed to this Court.

It is claimed by the appellant in the first instance that under the Act, agricultural produce itself is income and becomes charged to tax under the Madras Plantations Agricultural Income-tax Act, 1955, when it is received, and not when it is sold, used or consumed. Relying upon this premise it was urged that even on the view expressed by them the learned Judges of the High Court ought to have directed determination of the produce which was actually derived from agriculture in the year of account, and ought to have brought to tax only that quantity and excluded the value of the rest from taxation under the Act. Section 3 of the Act imposes the charge of tax upon the total agricultural income of the previous year of every person, and by section 4 the total agricultural income of any previous year of any person comprises all agricultural income derived from a plantation within the State and received within or without the State. "Agricultural income" is defined (in so far as the definition is relevant in these appeals) as meaning :

" (1) any rent or revenue derived from a plantation :

(2) any income derived from such plantation in the State by—

(i) agriculture ; or

(ii) the performance by a cultivator or receiver of rent-in-kind of any process ordinarily employed by a cultivator or receiver of rent-in-kind to render the produce raised or received by him fit to be taken to market ; or

(iii) the sale by a cultivator or receiver of rent-in-kind of the produce raised or received by him, in respect of which no process has been performed other than a process of the nature described in paragraph (ii) ;

*Explanation* 1 — * * * * *

*Explanation* 2 —

(3) * * * * * *"

*Prima facie*, section 3 of the Act read with the definition of "agricultural income" charges to tax the monetary return either as rent or revenue or agricultural produce from the plantation. The expression " income " in its normal connotation does not mean mere production or receipt of a commodity which may be converted into money Income arises when the commodity is disposed of by sale, consumption or use in the manufacture or other processes carried on by the assessee *qua* that commodity. There is no reason to think that the expression "income" in the Act has any other connotation. A tax on income whether agricultural or non-agricultural is, unless the Act provides otherwise, a tax on monetary return—actual or notional. Section 4 of the Act supports that view, for in the total agricultural income is comprised all agricultural income *derived* from a plantation in the State. It is not necessary, however, for income to accrue that there must be a sale of a commodity, consumption or use of a commodity in the business of the assessee from which the assessee obtain benefit of the commodity may be deemed to give rise to income. Therefore, merely because the produce of his plantation was received in the earlier years, assuming that the appellant's case is true, income derived from sale of that produce in the year of account is not exempt from tax under the Act, in that year.

Counsel for the appellant strongly relied upon a judgment of this Court in *Dooars Tea Co., Ltd* v. *Commissioner of Agricultural Income-tax, West Bengal*,[1] a case decided under the Bengal Agricultural Income-tax Act IV of 1944 It was held in interpreting the definition of section 2 (1) (*b*) of the Bengal Agricultural Income-tax Act, 1944, which is in substantially the same language as the definition under the Act, that it was not predicated of the agricultural income that it must be sold and profit or gain received from such sale before it can be included in the definition of agricultural income. In *Dooars Tea Co. Ltd's case*[1], the appellant grew bamboos, thatching grass and fuel by agricultural operations and utilized the products for the purpose of its tea business The claim of the Income-tax Authorities to tax the value of the produce was resisted on the plea that the produce was not sold. In rejecting that plea, the Court observed at page 13 :

"In terms the clause (section 2 (1) (*b*)) takes in income derived from agricultural land by agriculture; and as we have already pointed out giving the material words their plain grammatical meaning there is no doubt that agricultural produce constitutes income under this clause Is there anything in the context which requires the introduction of the concept of sale in interpreting this clause as suggested by the appellant? In our opinion this question must be answered in the negative Not only is there no indication in the context which would justify the importing of the concept of sale in the relevant clause, but as we have just indicated the indication provided by clauses (ii) and (iii) is all to the contrary. What this clause seems clearly to have in view is agricultural produce itself which has been used by the assessee "

But these observations do not, in our judgment, imply that agricultural produce when received by a person carrying on agricultural operations becomes income in his hands. The Court in that case was concerned to deal with a limited question whether a person who has raised agricultural produce instead of selling it uses that produce for his own business, can be said to have earned agricultural income ? The Court in that case held that he would be deemed to be earning income. The decision is authority for the proposition that for agricultural income to arise, it is not predicated that the agricultural produce must be sold : user of agricultural produce for the purpose of the business of the assessee may give rise to agricultural income.

The decision in *State of Kerala and another* v. *Bhavani Tea Produce Co. Ltd* [1] on which reliance was placed by Counsel for the appellant has, in our judgment, no relevance whatever in this case. In *Bhavani Tea Produce Company's case*[1], the assessee was required under section 25 of the Coffee Act, 1942, to deliver the coffee produced by it to the Coffee Board and the question which fell to be determined was

1. (1962) 2 S.C.J. 52: (1962) 3 S.C R. 157. (1962) 44 I.T R. 6 (13) : A.I R. 1962 S.C. 186.

whether such delivery constituted sale by operation of law as a result of which the assessee ceased to be the owner of the coffee, the moment it handed over the produce to the Coffee Board This Court held that under the relevant provisions of the Act as soon as the producer of coffee handed over the produce to the Coffee Board, it ceased to be the owner and income accrued to him at that point of time That case does not lay down the proposition that income accrues to a producer of agricultural produce before the date of disposal, use or sale

The second argument raised by the appellant has also no substance For the years 1955-56 and 1956-57 the appellant did not submit returns of income, but applied to compound the tax under section 65 of the Act, and paid the tax determined at the rates specified in Part II of the Schedule to the Act. Therefrom it cannot be inferred that the produce which was sold by him in the year of account to which these appeals relate had suffered tax in the earlier years. It has to be proved that the crop sold by the appellant related to the years in respect of which he had applied to compound the tax, and on that part of the case there is no evidence.

The appeals therefore fail and are dismissed with costs. There will be one hearing fee.

T.K.K. *Appeals dismissed.*

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## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—J. C. SHAH AND V. RAMASWAMI, JJ.

Commissioner of Income-tax, Madras .. *Appellant**

*v.*

Prithvi Insurance Co., Ltd. .. *Respondent.*

*Income-tax Act (XI of 1922), section 24 (2)—Loss—Set-off—Same business—Criterion—Inter-connection, interlacing interdependence and unity—Closure of one business without affecting the other business—Not a decisive test—Assessee a company carrying on life insurance and general insurance business—Allowed under the memorandum of association—Common administrative organisation and common expenses—Loss in life business against profits in general business—Set-off—Allowable—Same business.*

The assessee, a public limited company, carried on in the relevant years of account, business of insurance, life and general For the assessment year 1951-52 the Department and the Tribunal held that the life insurance business and general business carried on by the assessee were distinct and separate and the loss carried forward from the previous year in respect of the life insurance business could not be set-off under section 24 (2) against the profits of the general insurance business. But the High Court answered the reference in favour of the assessee The Revenue appealed.

*Held,* that the life insurance business and the general insurance business constitute the same business within the meaning of section 24 (2) of the Act and hence the unabsorbed losses incurred in the earlier years in the life insurance business are available to be set-off against the profits from the general insurance business.

Whether two or more lines of a business may be regarded as the same business or different businesses depends not upon the special methods prescribed by the Income-tax Act for computation of the taxable income, but upon the nature of the businesses, the nature of their co-organisation, management, source of the capital fund utilised, method of book-keeping and a host of other related circumstances which stamp them as the same or distinct The test is if there is any inter-connection, any interlacing, any interdependence and any unity at all embracing the two businesses The inter-connection, interlacing, interdependence and unity may be furnished by the existence of common management, common business organization, common administration, common fund and a common place of business

The test whether one of the businesses can be closed without affecting the conduct of the other business is not a decisive test in determining whether the two businesses constitute a same

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*C.As. Nos. 729 to 732 of 1965. 26th October, 1966.

business within the scope of section 24 (2) If one business cannot conveniently be carried on after the closure of the other, there would be a strong indication that the two businesses constitute the same business, but no desicive inference may be drawn from the fact that after the closure of one business another may conveniently be carried on.

*Held on facts* : the assessee was entitled to carry on the life insurance business and the general insurance business under its memorandum of association, and the businesses were attended to by the branch managers and the agents without any distinction, there was one common administrative organization and the expense incurred in connection with the business both for administration, and for heads of expenditure such as salary of the staff, postage, staff welfare fund and general charges, were common

Appeals by Special Leave from the Judgment and Order, dated the 3rd May, 1963, of the Madras High Court in Tax Case No 196 of 1960

*R M Hazarnavis* (*Gopal Singh* and *R. N. Sachthey*, Advocates, with him), for Appellant.

*S. Swaminathan* and *M. S. Narasiman*, Advocates, for Respondents

The Judgment of the Court was delivered by

*Shah, J.*—The respondent, a public limited company, carried on in the relevant years of account, business of insurance—life and general In each of the calendar years 1944 to 1948 relating to the assessment years 1945-46 to 1950-51, the company suffered loss in the life insurance section, and made profit in the general insurance section. Till the assessment year 1950-51 the loss suffered in the life insurance section was allowed by the Revenue authorities to be carried forward and set-off under section 24 (2) of the Indian Income-tax Act 1922, against profits from the general insurance section in the subsequent year. In the proceedings for assessment for the assessment year 1951-52 the Income-tax Officer held that the life insurance business and the general insurance business carried on by the company were "distinct and separate" and the loss carried forward from the previous year in respect of life insurance business could not be set-off under section 24 (2) against the profit of the general insurance business. The Appellate Assistant Commissioner and the Tribunal confirmed the view of the Income-tax Officer . The Tribunal referred the following question to the High Court of Madras under section 66 (1) of the Income-tax Act :

"Whether the unabsorbed losses incurred by the assessee in the earlier years in its life insurance business are available to be set-off against its profits from general insurance business for the assessment years 1951-52 to 1954-55?"

The High Court answered the question in the affirmative. With certificate granted by the High Court, these appeals have been preferred by the Commissioner of Income-tax.

The order of the Income-tax Appellate Tribunal summarises the reasons which persuaded the Departmental Authorities to reject the claim of the company. The Tribunal states :

"The business of life insurance possesses peculiar characteristics which do not exist in respect of other insurance businesses Firstly, the life insurance policies are not contracts of indemnity; they are forms of investments Other classes of insurance business are contracts of indemnity Secondly, the contract in the general insurance is generally annual, while in the case of life business the risk continues until death Unlike general insurance contracts, the life contract, is made once and for all The general insurance contracts, are in law, fresh contracts entered into at the time of each renewal . Thirdly, life business is controlled by principles essentially variant from those which control the general insurance business Fourthly, the life premia do not represent the life profits nor can the total amount of claims arising in one year be set-off as a deduction Fifthly, the law under which life business is carried on is quite different from the laws governing general business , and lastly, assessable profits of life business shall be computed separately from those of the general business the consequence of which would be that the carry forward of loss of life business cannot be had against the profit of general business"

Tax payable by an assessee under the head "Profits and gains of business, profession or vocation" is normally computed under section 10 (1) of the Income-tax Act, 1922 , after making allowances mentioned in sub-section (2) of section 10. But sub-section (7) of section 10 provides that notwithstanding anything to the contrary contained in sections 8, 9, 10, 12 or 18 of the Act, the profits and gains of any business

of insurance and the tax payable thereon shall be computed in accordance with the rules contained in the Schedule to the Act The Schedule is headed " Rules for the computation of the profits and gains of insurance business". By rule 1 it is provided that in the case of any person who carries on, or at any time in the preceding year carried on, life insurance business, the profits and gains of such person from that business shall be computed separately from his income, profits or gains from any other business By rule 2, it is provided.

" The profits and gains of life insurance shall be taken to be either—

(*a*) the gross external incomings of the preceding year from that business less the management expenses of that year, or

(*b*) the annual average of the surplus arrived at by adjusting the surplus or deficit, disclosed by the actuarial valuation made in accordance with the Insurance Act, 1938 (IV of 1938), in respect of the last inter-valuation period ending before the year for which the assessment is to be made, so as to exclude from it any surplus or deficit included therein which was made in any earlier inter-valuation period and any expenditure other than expenditure which may under the provisions of section 10 of this Act be allowed for in computing the profits and gains of a business,

whichever is the greater

Provided * * * * *"

Rules 3 and 4 lay down the methods of computing the surplus for the purpose of rule 2 Rule 5 is a definition clause Rule 6 deals with the computation of profits and gains of any business of insurance other than the life insurance, and provides that the profits and gains of any business of insurance other than life insurance shall be taken to be the balance of the profits disclosed by the annual accounts, copies of which are required under the Insurance Act, 1938, to be furnished to the Controller of Insurance after adjusting such balance so as to exclude from it any expenditure other than expenditure which may under the provisions of section 10 of the Act be allowed for in computing the profits and gains of a business. Rule 7 deals with the computation of profits and gains of companies carrying on dividing societies or assessment business. Rule 8 deals with the computation of profits of non-resident insurance companies having branches in the taxable territory Rule 9 provides that the profits of any business carried on by a mutual insurance association or by a co-operative society shall be computed in accordance with the Rules.

Computation of the assessable income of an assessee carrying on business of life insurance or general insurance has therefore to be made in accordance with the Rules and not by determining the profits under sub-section (1) of section 10 after making allowances under sub-section (2) Where an assessee sustains a loss of profits or gains in any year under any of the heads mentioned in section 6, he is entitled to have the amount of the loss set-off against his income, profits or gains under any other head in that year (section 24 (1)) Therefore in determining the taxable profits, the net balance under the same head mentioned in section 6 has to be taken into account, and if there be loss under a head of income (subject to the special exception relating to admissibility of loss from speculative business), that loss has to be set-off against the income, profits or gains under any other head. Sub-section (1) does not however deal with carry forward to the following year of loss suffered by the assessee as a result of computing the total income from all the heads. That is dealt with under sub-section (2) Section 24 (2) as it stood at the material time provided :

" Where any assessee sustains a loss of profits or gains in any year, being a previous year not earlier than the previous year for the assessment for the year ending on the 31st day of March, 1940 *in any business, profession or vocation* and the loss cannot be wholly set-off under sub-section (1), *so much of the loss as is not so set-off or the whole loss where the assessee had no other head of income* shall be carried forward to the following year and set-off against the profits and gains, if any, of the assessee from the same business, profession or vocation for that year, * * *"

The words italicised were substituted by the Income-tax Amendment Act (XXV of 1953), for the words " under the head ' profits and gains of business, profession or vocation' " and " the portion not so set-off " respectively. At the relevant time loss which could not be set-off in the year of account may be carried forward to the following year, but it could be set-off against the profits

and gains of the assessee from "the same business, profession or vocation" If the loss carried forward from the previous year and sought to be set-off was not from the same business, profession or vocation, it could not be set-off under section 24 (2). If there was no income or profits from the same business in the subsequent year, the loss could not be set-off, but had to be carried forward in the next year following, subject to the restriction placed in that sub-section

The question whether the business of life insurance and the business of general insurance could be regarded as the same business assumes importance in this case, since the right to carry forward the loss suffered in the life insurance business and to set it off against the profit of the company in the general insurance business of the subsequent year is clearly in issue. If the life insurance business and the general insurance business were not the "same business" within the meaning of section 24 (2) the loss in the life insurance business which could not be set-off against income from other businesses of the company and sources of income, could not be carried forward and set-off in the year following against the income from the general insurance business.

Counsel for the Commissioner contended that life insurance business and general insurance business were separate businesses and he relied in support of that contention primarily upon the method of computation of taxable income of the life insurance business and of the general insurance business. Both in respect of the life insurance business and general insurance business, there are, as already mentioned, special methods of computation of income But because there are distinct methods of computation of taxable income of the insurance business, and the general provisions of the Income-tax Act relating to computation of profits and gains of a business in section 10 and the related sections are inapplicable, it does not follow that the two businesses cannot be the "same business" within the meaning of section 24 (2) Whether two or more lines of business, may be regarded as the "same business' or different businesses depends not upon the special methods prescribed by the Income-tax Act for computation of the taxable income, but upon the nature of the businesses, the nature of their organisation, management, source of the capital fund utilised, method of book-keeping and a host of other related circumstances which stamp them as the same or distinct

In the present case, there is little doubt that the two businesses constituted one composite business: the company was entitled to carry on the life insurance business and the general insurance business under its memorandum of association, and the businesses were attended to by the branch managers and the agents without any distinction, there was one common administrative organization and the expenses incurred in connection with the business both for administration and for heads of expenditure such as salary of the staff, postage, staff welfare fund and general charges, were common

We are unable to agree with Counsel for the Commissioner that the test whether one of the businesses can be closed without affecting the conduct of the other business, is a decisive test in determining whether the two constitute the same business within the meaning of section 24 (2) If one business cannot conveniently be carried on after the closure of the other, there would be a strong indication that the two businesses constitute "the same business", but no decisive inference may be drawn from the fact that after the closure of one business another may conveniently be carried on.

In the present case the Tribunal's judgment proceeds not upon any special circumstances governing the distinctive organization, management, accounts, methods of book-keeping or the peculiarities of the two businesses, but primarily upon the provisions of the Income-tax Act which provided different methods of computation of the taxable income of the life insurance business and of the general insurance business. We are unable to agree with the Tribunal, that because in respect of the life insurance business and general insurance business there are special methods of

computation of income for the purpose of levying income-tax, they are not the "same business" within the meaning of section 24 (2) A fairly adequate test for determining whether the two constitute the same business is furnished by what Rowlatt, J, said in *Scales* v *George Thompson & Co, Ltd* [1],

"Was there any inter-connection, any interlacing, any inter-dependence, any unity at all embracing those two businesses?"

That inter-connection, interlacing, inter-dependence and unity are furnished in this case by the existence of common management, common business organisation, common administration, common fund and a common place of business.

In our view therefore the High Court was right in holding that the life insurance business and the general insurance business constitute the same business within the meaning of section 24 (2) of the Act.

The appeals therefore fail and are dismissed with costs One hearing fee.

T.K.K. ——— *Appeals dismissed.*

THE SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction)

PRESENT.—K SUBBA RAO, *Chief Justice* AND J M. SHELAT, J.

Manujendra Dutt .. *Appellant**

*v.*

Purnedu Prosad Roy Chowdhury and others . *Respondents.*

*Tenancy—Registered lease deed—Provisions for six months' notice to quit when tenant holds over—Notice not given—Suit in civil Court transferred to Thika Controller under section 29 of the Calcutta Tenancy Act—Suit if can be maintained*

*Calcutta Thika Tenancy Act (II of* 1949), *sections* 3 *and* 29 *and Amendment Act (VI of* 1953), *section* 8*—Suit for eviction in civil Court transferred to Thikka Controller under section* 29*—Section deleted by Amendment Act—Jurisdiction of Controller to decide—Bengal General Clauses Act* (1899), *section* 8.

The High Court of Calcutta in civil revision held (i) that in spite of the facts that section 29 of the Calcutta Thika Tenancy Act, 1949 was deleted by the Amending Act (VI of 1953) the Thika Controller did not lose his jurisdiction to decide the suit for eviction of appellant which was transferred to his file because of that section, and (ii) that in spite of the six months' notice provided for termination of the tenancy under the registered lease the non-obstante provision in section of 3 of the Tenancy Act entitled the landlord to a decree for eviction without first terminating the tenancy by a notice as provided for therein.

The same two contentions were pressed before the Supreme Court.

*Held,* the deletion of section 29 would not affect the pending proceedings and would not deprive the Controller of the jurisdiction to try such proceedings pending before him at the date the Amendment Act came into force. Though the Amendment Act did not contain a saving clause, under section 8 of Bengal General Clauses Act, 1899, the transfer of the suit having been lawfully made under section 29, its deletion would not affect the law applicable to the claim in the litigation. The High Court was right in holding that the Controller still had the jurisdiction to proceed with the suit transferred to him.

The Thika Tenancy Act like similar Rent Acts is intended to prevent indiscriminate eviction of the tenants and is intended to be a protective statute to safeguard security of possession of tenants and should be construed as such.

The word 'notwithstanding' in section 3 of the Tenancy Act, on a true construction therefore means that even where the contractual tenancy is properly terminated, notwithstanding the landlord's right to possession under the contract of lease or the general law, he cannot evict the tenant except on any one of the grounds set out in section 3

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1. (1927) 13 T C 83, 89

* C A No. 586 of 1964 22nd September, 1966.

The Thika Tenancy Act does not confer any additional rights on a landlord but on the contrary imposes certain restrictions on his right to evict a tenant under the general law or under the contract of lease. The Act like other Rent Acts (enacted in various States) imposes certain further restrictions on the right of the landlord to evict the tenant and lays down that the status of irremovability of a tenant cannot be got rid of except on specified grounds set out in section 3. The right of the appellant therefore to have a notice as provided for by the proviso to clause 7 of the deed of lease was not in any manner affected by section 3 of the Thika Tenancy Act The effect of the non-obstante clause was that even where a landlord has duly terminated the contractual tenancy or is otherwise entitled to evict his tenant he would still be entitled to a decree for eviction provided that his claim for possession falls under any one or more of the grounds in section 3. Before therefore the landlords could be said to be entitled to a decree for eviction they had first to give six months notice as required by the proviso to clause 7 of the deed of lease and such notice not having been admittedly given their suit for eviction could not succeed.

Appeal from the Judgment and Order, dated the 1st April, 1960 of the Calcutta High Court in Civil Revision No 2612 of 1957.

*C B. Agarwala*, Senior Advocate ( *Sukumar Ghouse*, Advocate, with him), for Appellant

*Sarjoo Prasad*, Senior Advocate (*D N Mukherjee*, Advocate, with him), for Respondents.

The Judgment of the Court was delivered by

*Shelat, J*—Two questions arise in this appeal by certificate granted by the High Court at Calcutta, (1) as regards the jurisdiction of the Controller under the Calcutta Thika Tenancy Act, 1949, after the deletion therefrom of section 29 by Amendment Act VI of 1953 in respect of proceedings pending before him on that date and (2) the right of a Thika Tenant as defined by the Act to a notice provided under the Deed of Lease

By a registered lease, dated 4th December, 1934, the appellant entered into possession of the land demised thereunder from the Bhowanipore Wards Estate which was then managing the said property at a monthly rent of Rs 47-0-3 P The lease was for a fixed term of 10 years and *inter alia* gave the tenant option of renewal of the said lease provided he offered the maximum rent which might be offered by intending tenants on expiry of the said term Clause 7 of the Deed of Lease provided that the lessee shall be bound on the termination or sooner determination of the lease to restore to the lessors the land demised after removing the structures with drains, privies, water-taps, etc , leaving the land in the same state as it was at the date of the lease It also provided that the lessee would be bound to sell the said structures, privies, drains, etc to the lessors if the lessors so desired at a valuation to be fixed by a qualified Engineer specified therein. Clause 7 then provided as follows—

"Provided always and it is hereby agreed and declared that if it be required that the lessee should vacate the said premises at the end of the said term of 10 years the lessee will be served with a 6 months notice ending with the expiry of the said term and it is further agreed that if the lessee is permitted to hold over the land after the expiry of the said term of 10 years the lessee will be allowed a six months notice to quit and vacate the said premises"

It is clear that the lessee was entitled to a six months notice in the following two events before he could be required to vacate: (1) If the lessors desired the lessee to vacate at the end of ten years and not to renew the lease, they were bound to give six months notice ending with the expiry of the term of 10 years, and (2) if on the expiry of the term the lease was not renewed but the lessee was allowed to hold over the lessors were bound to give him six months' notice before being asked to quit. After the execution of the said lease the appellant built certain structures on some portion of the said land and let out the remaining portion as permitted under the said lease Since the said period of ten years was to expire on 1st December, 1944, the appellant by his letter, dated 30th November, 1944, to the Bhowanipore Wards Estate expressed his desire to exercise his option of renewal stating therein that he

was prepared to pay such higher rent as the lessors had by that time received According to the appellant, since he did not receive any reply to the said offer he continued to be in possession of the demised land and as was the practice between the parties, continued to deposit the aforesaid rent from time to time in the Treasury of Alipore Collectorate. On 26th May, 1945, the Manager of the Wards Estate intimated to the appellant that the renewal of the said lease was not sanctioned and asked the appellant if he was agreeable to pay rent at the rate of Rs 12 per month per Cottah and a *Selami* equivalent to one year's rent The appellant wrote back to say that he had already exercised his option, that he had been regularly depositing the said rent and that the said demand was excessive and he was therefore not bound to pay the same Considerable correspondence thereafter ensued between the parties ending with the notice, dated 14th October, 1946, by the said Wards Estate stating that as the appellant did not agree to pay the rent as demanded by them and the said lease was not renewed he was a trespasser and was not entitled to any notice under the said lease and required him to deliver vacant possession of, the said land after removing the structures within two weeks from the date of the receipt of the notice On 11th July, 1947, the Court of Wards instituted a suit in the First Court of the Subordinate Judge at Alipore for ejectment and for mesne profits In his written statement the appellant maintained that he had lawfully exercised his option of renewal, that after receipt of his said letter the Wards Estate had continued to accept the rent as agreed under the said lease, that the demand of Rs. 12 per cottah was not a *bona fide* one that the said notice was illegal While the suit was pending the Calcutta Thika Tenancy Act, 1949, was enacted and brought into force. On both the parties agreeing that the appellant was a Thika Tenant as defined by the said Act and that therefore the suit would be governed by that Act the Court transferred it to the Thika Controller under section 29 of the Act The suit thus stood transferred to the Fourth Court of the Munsiff at Alipore who was the Thika Controller under the Act While the suit was still pending the West Bengal Legislature passed the said Amendment Act VI of 1953 which came into force on 21st April, 1953, by section 8 of which sections 28 and 29 of the Act were deleted On 12th September, 1953, the appellant filed an application before the Thika Controller that as a result of the deletion of section 29 he lost jurisdiction over the said suit That application was however rejected and the suit continued to be on the file of the Controller On 25th January, 1954, the respondents applied for amendment of the plaint contending that they were entitled to a decree for ejectment on the grounds (*a*) that the appellant had failed to use or occupy himself a major portion of the said land, (*b*) that the said land was required by the landlords for constructing a building on and developing the said land and (*c*) that the said lease had expired by efflux of time, thus seeking to bring their suit within the grounds (iv), (v) and (vi) in section 3 of the Act The aforesaid amendment was allowed and the suit was proceeded with on the cause of action as so amended By a supplementary written statement the appellant denied the aforesaid allegations On 24th June, 1955, the names of the present respondents were substituted for the said Court of Wards, as management of the said property was released as and from 15th April, 1955 By a judgment and order, dated 11th August, 1956, the Controller directed the eviction of the appellant subject to the respondents paying compensation either as agreed to between the parties or as may be determined by him on an application made therefor by either of the parties The Controller held that on the expiry of the said term the appellant became a trespasser and was not entitled to a six months' notice as provided by the said lease and upheld the respondent's contention that they had satisfied the grounds as set out in clauses (iv), (v) and (vi) of section 3 of the Act An appeal was preferred against the said judgment and order before the Subordinate Judge at Alipore who dismissed it holding that the suit was governed by section 5 of the Act, that after the expiry of the said term there was no holding over by the appellant, that in spite of the deletion of section 29 the Controller continued to have jurisdiction over matters transferred to him and pending at the date when the Amending Act of 1953 came into force. He, however, held that the respondents were not entitled

to evict the appellant on the ground that they required the said land either for building on it or otherwise developing it but upheld their contention that they were entitled to an order of eviction under clauses (v) and (vi) of section 3 The appellant took the matter to the High Court under Article 227 challenging the correctness of the said judgment and order which application was converted into Civil Revision No 2612 of 1957.

Before the High Court two questions were canvassed : (1) regarding the jurisdiction of the Controller after section 29 of the Act was deleted and (2) regarding the notice which the appellant claimed he was entitled to under the said lease before the respondents could exercise any right of eviction. The High Court was of the view that in spite of the deletion of section 29 the jurisdiction of the Controller in respect of matters pending before him at the date of the coming into force of the said Amending Act was saved and also rejected the appellant's contention as to notice on the ground that the *non-obstante* provision in section 3 of the Act entitled the landlords to a decree for eviction without first terminating the contractual tenancy by a notice as provided for by the said proviso to clause 7 of the said Deed of Lease.

Mr Agarwal for the appellant, at first raised four contentions before us, *viz.*, (1) whether section 3 of the Act deprived a tenant of his rights under the lease, (2) whether the Controller had jurisdiction to proceed with the case after the deletion of section 29 from the Act, (3) whether there was a renewal of the said lease and (4) whether the appellant could be evicted on the ground of sub-letting even though the said lease expressly permitted him to sub-let However, in view of the fact that only two of these contentions, *viz* , regarding jurisdiction and notice had been pressed before the High Court he confined his arguments on those two questions only. The contention of Mr Agarwal was that since it was only by reason of section 29 that the suit had been transferred to the Controller the deletion of that section from the Act by section 8 of the Amendment Act of 1953 had the effect of depriving the Controller of his jurisdiction to try the suit and therefore the judgment and order passed by him though confirmed by the learned Subordinate Judge and the High Court was without jurisdiction and therefore bad In our view, this contention has no force. Though section 29 was deleted by the Amendment Act of 1953 the deletion would not affect pending proceedings and would not deprive the Controller of his jurisdiction to try such proceedings pending before him at the date when the Amendment Act came into force Though the Amendment Act did not contain any saving clause, under section 8 of the Bengal General Clauses Act, 1899, the transfer of the suit having been lawfully made under section 29 of the Act its deletion would not have the effect of altering the law applicable to the claim in the litigation. There is nothing in section 8 of the Amending Act of 1953 suggesting a different intention and therefore the deletion would not affect the previous operation of section 5 of the Calcutta Thika Tenancy Act or the transfer of the suit to the Controller or anything duly done under section 29. That being the correct position in law the High Court was right in holding that in spite of the deletion of section 29 the Controller still had the jurisdiction to proceed with the said suit transferred to him.

The second contention of Mr. Agarwal regarding the six months' notice as provided for in the lease was that in spite of the *non-obstante* provision in section 3 of the Act that provision did not have the effect of depriving a tenant of his right to have a notice before termination of his tenancy if he has such a right either under the lease or under the Transfer of Property Act. The argument was that on a true interpretation of section 3 of the Act the position was that besides not depriving the rights of a tenant under a contract of lease or under the general law the section imposes further restrictions on the right of the landlord to evict a tenant Therefore, a landlord is entitled to a decree for eviction only (*a*) if he has first terminated the contractual tenancy and (*b*) where the landlord fulfils the requirements of one or more of the several grounds in section 3 The Thika Tenancy Act like similar Rent Acts passed in different States is intended to prevent indiscriminate eviction of tenants and is intended to be a protective statute to safeguard security of possession of tenants and therefore should be construed in the light of its being a social legislation What section 3 therefore does is to provide that even where a landlord has terminated the

contractual tenancy by a proper notice such landlord can succeed in evicting his tenant provided that he falls under one or more of the clauses of that section. The word "notwithstanding" in section 3 on a true construction therefore means that even where the contractual tenancy is properly terminated, notwithstanding the landlord's right to possession under the Transfer of Property Act or the contract of lease he cannot evict the tenant unless he satisfied any one of the grounds set out in section 3 Rent Acts are not ordinarily intended to interfere with contractual leases and are Acts for the protection of tenants and are consequently restrictive and not enabling, conferring no new rights of action but restricting the existing rights either under the contract or under the general law It is well settled that statutory tenancy normally arises when a tenant under a lease holds over, that is he remains in possession after the expiry or determination of the contractual tenancy. A statutory tenancy therefore comes into existence wher a contractual tenant retains possession after the contract has been determined The right to hold over, that is, the right of irremovability, thus is a right which comes into existence after the expiration of the lease and until the lease is terminated or expires by efflux of time the tenant need not seek protection under the Rent Act For, he is protected by his lease in breach of which he cannot be evicted (See *Meghji Lakshamshi and Bros.* v. *Furniture Workship*[1] In *Abbasbhai* v. *Gulamnabi*[2]), this Court clearly stated that the Rent Act did not give a right to the landlord to evict a contractual tenant without first determining the contractual tenancy In *Mangilal* v *Sugam Chand*[3], while construing section 4 of the Madhya Pradesh Accommodation Control Act (XXIII of 1965), a section similar to section 3 of the present Act, this Court held that the provisions of section 4 of that Act were in addition to those of the Transfer of Property Act and therefore before a tenant could be evicted by a landlord, he must comply with both the provisions of section 106 of the Transfer of Property Act and those of section 4 The Court further observed that notice under section 106 was essential to bring to an end the relationship of landlord and tenant and unless that relationship was validly terminated by giving a proper notice under section 106 of the Transfer of Property Act, the landlord could not get the right to obtain possession of the premises by evicting the tenant (See also *Haji Mohamed* v *Rebati Bhushan*[4] In *Monmatha Nath* v *Banarasi*[5]), the High Court at Calcutta while dealing with the present Act held that in matters not dealt with by the Act it would still be the Transfer of Property Act which would apply, for, the Thika Tenancy Act is not a complete Code and deals only with some aspects of Thika Tenancy. It does not provide for the rights and liabilities of the lessor and lessee in a Thika Tenancy and therefore, for those purposes, one has still to look to the Transfer of Property Act. The only decision which has taken a contrary view is *R Krishnamurthy* v *Parthasarathy*[6], where it was held that section 7 of the Madras Buildings (Lease and Rent Control) Act (XV of 1946) had its own scheme of procedure and therefore there was no question of an attempt to reconcile that Act with the Transfer of Property Act. On that view, the High Court held that an application for eviction could be made to the Rent Controller even before the contractual tenancy was terminated by a notice to quit. That decision is clearly contrary to the decisions of this Court in *Abbasbhai's case*[2], and *Mangilal's case*[3], and therefore is not correct law

It was however, argued by Mr. Sarjooprasad on behalf of the respondents that on the footing that the provisions of the Thika Act could only be availed of by a landlord after the termination of the contractual tenancy no notice either under section 106 of the Transfer of Property Act or under the lease was necessary in the present case as the lease expired by efflux of time and no renewal was agreed upon by the parties Therefore, since the lease expired the lessee in the absence of any such renewal was bound to hand over vacant possession to the respondents as provided by clause 7 of the said lease Mr Sarjooprasad argued that in the absence of any renewal of the lease if the appellant continued to be in possession of the property in

1 (1954) L R A C 80 at p 90
2 A I R. 1964 S C 1341.
3 A I R 1965 S C 101.
4 (1949) 53 C W N 859
5 (1959) 63 C W N 824 at 831.
6 (1949 1 M L J 412 A I R 1949 Mad 780

suit his possession was that of a trespasser and therefore there was no question of any notice having to be given to him. The construction suggested by Mr. Sarjooprasad cannot be upheld as such a construction would be contrary to the express language of the proviso to clause 7 of the lease. As already stated clause 7 requires that on the determination of the lease by efflux of time or earlier termination the lessee has to hand over vacant possession of the land in its original position after removing the structures constructed thereon by him. If the structures are not so removed the lessee has to sell them to the lessor at a valuation to be fixed by the lessor's Engineer. What would happen in a case where the tenant is not informed and does not know whether his lease which is for a fixed term would be extended by a renewal or otherwise? If there is no provision for an option to renew and the landlord does not extend the term, he has, of course, to vacate on the expiry of the term. But where the lease provides for an option and the tenant exercises the option it is but fair and equitable that he must know in good time whether the lessor agrees to the renewal or not It is to provide against a contingency where the lessee would have to quit without a fair opportunity to dispose of the structures he has put up that the proviso was added in clause 7 of the lease and that proviso must be given effect to. The proviso lays down the condition of six months' notice ending with the expiry of the term clearly to enable the lessee to remove the structures, if need be, if the lease was not renewed or extended. The object of inserting such a condition being clear as aforesaid it would not be right to construe clause 7 and its proviso in the manner suggested by the respondents.

To summarise the position : The Thika Tenancy Act does not confer any additional rights on a landlord but on the contrary imposes certain restrictions on his right to evict a tenant under the general law or under the contract of lease The Thika Act like other Rent Acts enacted in various States imposes certain further restrictions on the right of the landlord to evict his tenant and lays down that the status of irremovability of a tenant cannot be got rid of except on specified grounds set out in section 3 The right of the appellant therefore to have a notice as provided for by the proviso to clause 7 of the Lease was not in any manner affected by section 3 of the Thika Act. The effect of the *non-obstante* clause was that even where a landlord has duly terminated the contractual tenancy or is otherwise entitled to evict his tenant he would still be entitled to a decree for eviction provided that his claim for possession falls under any one or more of the grounds in section 3 Before therefore the respondents could be said to be entitled to a decree for eviction they had first to give six months' notice as required by the proviso to clause 7 of the lease and such notice not having been admittedly given their suit for eviction could not succeed.

In our view the construction placed by the High Court on section 3 was not correct and the High Court was wrong in holding that the words " notwithstanding anything contained in any other law for the time being in force or in any contract " absolved the respodents from their obligation to give the six months' notice to the appellant before claiming from him vacant possession of the land in question

In the result, we allow the appeal, set aside the judgment and order passed by the High Court and dismiss the respondent's suit The respondents will pay to the appellant his costs all throughout

K.G S. *Appeal allowed:*
*Suit dismissed.*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction)

PRESENT :—K. SUBBA RAO, J R. MUDHOLKAR AND R. S BACHAWAT, JJ

R Jeevaratnam .. *Appellant**

*v.*

The State of Madras .. *Respondent.*

*Constitution of India* (1950), *Article* 311—*Dismissal of civil servant with retrospective effect—Validity—Refusal to allow the civil servant concerned to be represented, at the enquiry preceding his dismissal, by a counsel of his own choice—Effect.*

When a civil servant is suspended pending enquiry into charges against him and is subsequently dismissed with effect from the date of his suspension, such an order is in substance an order of dismissal as from the date of the order with the superadded direction that the order should operate retrospectively from the date of suspension of the civil servant concerned The two parts of the order are clearly severable. Assuming that the second part, giving retrospective effect to the order, is invalid on the ground that an order of dismissal cannot be passed with retrospective effect, there is no reason why the first part of the order, namely, dismissal as from the date when such order is made, should not be given the fullest effect. The Court, no doubt, cannot pass a new order of dismissal, but surely it can give effect to the valid and severable part of the order.

*Abdul Hamid* v. *The District School Board, 24-Parganas,* (1957) 61 C W.N. 880 and *Sudhir Ranjan Haldar* v. *State of West Bengal,* A I R. 1961 Cal. 626, overruled.

*Held on facts* that the refusal of the prayer of the civil servant—who was discharged on the basis of findings arrived at in an enquiry into charges against him—for engaging a Counsel of his own choice to represent him at the enquiry, did not prejudice him in his defence and hence such refusal was not a ground for setting aside the order of dismissal.

Appeal from the Judgment and Order dated the 23rd October, 1960, of the Madras High Court in Appeal No. 237 of 1958

*R. Thiagarajan* and *R Ganapathy Iyer,* Advocates, for Appellant.

*A Ranganadham Chetty,* Senior Advocate, (*A. V. Rangam,* Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

*Bachawat, J*—The appellant held the post of Deputy Tahsildar in the Revenue Department of the Government of Madras Disciplinary proceedings were started against him on twelve charges of acceptance of illegal gratification during his office as Special Loans Deputy Tahsildar, Cuddalore, South Arcot District Disciplinary proceedings were started against three of his subordinates also on similar charges On 20th May, 1949, he was placed under suspension and relieved of his duties The Disciplinary Proceedings Tribunal directed the consolidation and common hearing of the enquiries against the appellant and the other three civil servants The appellant asked for permission to engage a Counsel at the enquiry. By an order dated 31st May, 1949, the Tribunal refused to give the permission. The enquiry was held on 13th, 14th and 15th June At the hearing, the other three civil servants were represented by Counsel, Sri Kalyanasundaram On 13th June, the appellant prayed for an adjournment The Tribunal declined to grant the adjournment and told the appellant that he was at liberty to engage Sri Kalyanasundaram, as his Counsel The appellant thereupon availed himself of the services of Sri Kalyanasundaram and was represented by him throughout the enquiry On 30th June, the Tribunal submitted a report stating that the charges against the appellant were proved and recommending his dismissal On 16th September, the Government issued a notice to him asking him to show cause why he should not be dismissed from service On 12th November, 1949, he submitted his written representation On 17th October, 1950, the Government directed that he be dismissed from service with effect from 20th May, 1949 The appellant instituted the suit asking for a declaration that the order dated 17th October, 1950, dismissing

*C.A No. 232 of 1965. 13th October, 1965.

him from service is illegal and void The trial Court dismissed the suit, and this decree was affirmed on appeal by the High Court of Madras. The appellant now appeals to this Court by Special Leave.

Counsel for the appellant submitted that in view of the refusal of the appellant's prayer for engaging a Counsel of his own choice and his prayer for adjournment of the hearing on 13th June, 1949, the appellant had been denied a reasonable opportunity to defend himself against the charges We are not inclined to accept this submission There was no conflict of interests between him and the other three civil servants. Counsel representing the other three civil servants was allowed by the Tribunal also to represent him The enquiry continued for three days It is not proved that Counsel was unable to conduct the defence properly Even in his written representation dated 12th November, 1949, the appellant did not allege that he was prejudiced in his defence We are satisfied that the appellant had reasonable opportunity to defend himself against the charges.

Counsel for the appellant next contended that the order of dismissal dated 17th October, 1950, having been passed with retrospective effect is illegal and inoperative Counsel for the respondent submitted (1) the order of dismissal with retrospective effect as from the date of the suspension is valid in its entirety, and (2) in any event, the order is valid and effective as from 17th October, 1950 The High Court accepted the first contention and declined to express any opinion on the second contention In our opinion, the second contention of the respondent is sound, and in this view of the matter, we decline to express any opinion on the first contention Counsel for the appellant conceded that if the respondent's second contention is accepted, the appeal must fail.

The order dated 17th October, 1950, directed that the appellant be dismissed from service with effect from the date of his suspension, that is to say, from 20th May, 1949 In substance, this order directed that (1) the appellant be dismissed, and (2) the dismissal do operate retrospectively as from 20th May, 1949. The two parts of this composite order are separable The first part of the order operates as a dismissal of the appellant as from 17th October, 1950 The invalidity of the second part of the order, assuming this part to be invalid, does not affect the first part of the order The order of dismissal as from 17th October, 1950, is valid and effective The appellant has been lawfully dismissed, and he is not entitled to claim that he is still in service.

We may now notice the cases relied on by Counsel for the appellant. In *Hemanta Kumar* v. *S N. Mukherjee*[1]. the Calcutta High Court had occasion to consider an order dated 29th April, 1952, by which a civil servant had been placed under suspension with retrospective effect from 16th January, 1951. While holding that the order of suspension for the period, 16th January 1951, up to 28th April, 1952 was invalid and should be quashed, the Court held that the order of suspension was valid and effective as and from 29th April, 1952 and this part of the order should be upheld. As a matter of fact, the validity of the suspension as from 29th April, 1952 was not even questioned, by Counsel for the parties. Far from supporting the appellant this decision is against him on the point under consideration In *Abdul Hamid* v. *The District School Board, 24-Parganas*[2], the Calcutta High Court had occasion to consider an order dated 18th April, 1952, discharging a teacher employed by a District School Board from service with effect from 15th July, 1951, the date on which he had been arrested in connection with a pending criminal case against him While holding that the dismissal for the period from 15th July, 1951, up to 17th April, 1952 was invalid, the High Court also held that the order of dismissal was entirely bad and was not effective even from 18th April, 1952 The High Court observed :

> " It appears to me that when the real intention of the Board was to discharge the petitioner with effect from the date when he was put under arrest it is not within the jurisdiction of the Court to substitute a different intention and maintain the order of discharge in a modified form The order must stand or fall *in toto* In this view of the matter it appears to me that the order of discharge as passed by the Board cannot stand "

1. (1953) 58 C.W N 1. 2. (1957) 61 C W N 880.

Our attention is drawn to similar observations in *Sudhir Ranjan Haldar* v. *State of West Bengal*[1] With respect, we are unable to agree with this line of reasoning. An order of dismissal with retrospective effect is, in substance, an order of dismissal as from the date of the order with the superadded direction that the order should operate retrospectively as from an anterior date. The two parts of the order are clearly severable Assuming that the second part of the order is invalid, there is no reason why the first part of the order should not be given the fullest effect. The Court cannot pass a new order of dismissal, but surely it can give effect to the valid and severable part of the order

In the result, the appeal is dismissed. There will be no order as to costs. The appellant is exempted from paying Court-fees.

V.K. ——— *Appeal dismissed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT —P. B GAJENDRAGADKAR, *Chief Justice*, K N. WANCHOO, M. HIDAYATULLAH, J. C. SHAH AND S. M SIKRI, JJ.

The Indian Chemical and Pharmaceutical Works, Hyderabad .. *Appellant**

*v.*

The State of Andhra Pradesh and others .. *Respondents.*

*Andhra Pradesh (Telengana Area) Intoxicating Drugs Act (IV of* 1333-*F*)—*If repealed* in toto *on introduction (in the Hyderabad State) of the two Central Acts (Dangerous Drugs Act (II of* 1930) *and Drugs Act (XXXIII of* 1950))—*Amendment thereafter by Hyderabad Act (XXII of* 1953)—*Validity of*

*Andhra Pradesh (Telengana Area) Chloral Hydrate Rules,* 1962—*If* intra vires *of the Intoxicating Drugs Act (IV of* 1333-*F*) (*as amended in* 1953)

The appellant manufactures drugs in Hyderabad (Telengana Area of Andhra Pradesh State) and one of the drugs is chloral hydrate On the issue of the Chloral Hydrate Rules, 1962, he was called upon to take out a licence for the manufacture of chloral hydrate and pay a license fee of Rs 500 per annum He filed a writ petition in the High Court of Andhra Pradesh challenging *inter alia* the validity of the said Rules

The main contention was that the Intoxicating Drugs Act (IV of 1333-F) had been repealed *in toto* on the introduction of the two Central Acts *viz* (i) the Dangerous Drugs Act (II of 1930) and (ii) the Drugs Act (XXIII of 1940) in 1950 and 1951 respectively and therefore no amendment could be made, by the Hyderabad (Amendment) Act XXII of 1953 Hence there was no law in force on the basis of which the impugned Rules could be promulgated Secondly, the said Rules with respect to chloral hydrate was not *intra vires* of the amended Act (IV of 1333-F)

The High Court repelled both the contentions and refused leave to appeal to the Supreme Court. On appeal to the Supreme Court by Special Leave

*Held* A substance which is a drug may fall under the Dangerous Drugs Act if it is defined there and it may also fall under the Drugs Act and may be subject to the provisions therein But at the same time it may fall under Entry 51 of List II of the Seventh Schedule to the Constitution of India, 1950, if it is a narcotic or narcotic drug Thus even if a substance is governed by the two Central Acts aforesaid it may well be liable to duties of excise under Entry 51 of List II and of such control as is incidental thereto

From an analysis of the provisions of the Act IV of 1333-F particularly sections 2, 4 and 5 it will be seen that the Act was in the nature of an Excise Act and provided for licenses and collection of duties of excise

The Dangerous Drugs Act provides for prohibition or control, creates offences, provides for penalties and lays down procedure in that behalf, it is not an Act imposing duties of excise, providing for collection of duties with incidental provisions in that behalf It will not therefore affect any law as Act IV of 1333-F. dealing with the imposition and collection of duties.

The introduction of the Dangerous Drugs Act in Hyderabad State by Central Act XXXIII of 1950 did not result in the complete effacement of the 1333-F Act of the State, by virtue of any of

1. A.I R 1961 Cal 626, 630.

* C.A. No. 649 of 1964. 7th October, 1965.

the provisions of Central Act XXXIII of 1950 The State Act of 1333-F remained alive even so far as the drugs contained in the Dangerous Drugs Act for the purpose of collection of duties of excise thereon It also remained alive with respect to other substances that may be notified as intoxicating drugs under section 2 thereof

The Drugs Act is mainly concerned with the standard and quality of drugs manufactured in the country and controls the manufacture, sale and distribution of drugs As held in the case of introduction of the Dangerous Drugs Act, Hyderabad Act of 1333-F. remained alive after the introduction of this Drugs Act also and section 2 of the Drugs Act provides that " the provisions of this Act shall be in addition to and not in derogation of the Dangerous Drugs Act, 1930, and any other law for the time being in force " Even if the Central Act III of 1951, applying this Act to Hyderabad State, by section 6 thereof can be said to repeal any provision of the 1333-F Act which is concerned with matters other than collection of duties of excise thereunder, that will not affect the amendment made in the 1333-F Act by Hyderabad Act XXII of 1953 for so long as the 1333-F Act was not completely dead prior to 1953, that amendment will be treated as an addition to the provisions of the Drugs Act

" Intoxing drugs" as defined in the amended Act includes 'any other intoxicating and narcotic substance which the Government may by notification declare to be an intoxicating drug ' 'Chloral hydrate' has been notified by the State of Andhra Pradesh as an intoxicating drug within the meaning of the Act and thereafter the Rules of 1962 have been framed.

If ' chloral hydrate ' is an intoxicating and narcotic substance the Rules could be framed with respect to its control and the appellant could be asked to take out a licence and pay excise duty on the manufacture thereof even though it is a drug under the Drugs Act On the evidence in the instant case there can be no other conclusion than that chloral hydrate is a narcotic or a narcotic drug within the Entry 51 of List II of the Seventh Schedule

As for the reliance on the ' Medicinal and Toilet Preparations (Excise Duties) Act (XVI of 1955)' the licence produced shows that cholral hydrate is being manufactured under the Drugs Act and the Rules framed thereunder and the judgment of the High Court also being silent as to any claim that it was a medicinal preparation and therefore exempt, this new point was not allowed to be raised for the first time in the appeal

Appeal by Special Leave from the Judgment and Order dated the 30th March, 1963, of the Andhra Pradesh High Court in W P. No. 1061 of 1962.

*Arun B. Saharya* and *Sardar Bahadur*, Advocates, for Appellant.

*P. Rama Reddy* and *T. V. R. Tatachari*, Advocates, for Respondent No. 1.

The Judgment of the Court was delivered by

*Wanchoo, J.*—This is an appeal by Special Leave against the judgment of the Andhra Pradesh High Court. The appellant manufactures drugs in Hyderabad and among the drugs manufactured by it is chloral hydrate. In September, 1962, the State of Andhra Pradesh issued Rules called the Andhra Pradesh (Telangana Area) Chloral Hydrate (Chloral) Rules, 1962 with respect to manufacture, possession, sale, import, export and transport of chloral hydrate (hereinafter referred to as the Rules). We shall refer to the Rules in detail later, but in brief they provide that the manufacture of chloral hydrate shall take place only in accordance with the conditions of a licence granted by the Excise Commissioner and only on payment of excise duty of Rs 500 per annum The Rules also provide for possession, import, export, sale and transport of chloral hydrate In consequence of the issue of the Rules the appellant was called upon to take out a licence and pay the necessary excise duty. The appellant refused to do so and in November, 1962 filed a writ petition in the High Court challenging *inter alia* the validity of the Rules It may be mentioned that the Rules were issued under the Andhra Pradesh (Telangana Area) Intoxicating Drugs Act IV of 1333 Fasli (hereinafter referred to as the 1333-F Act) as amended by the Hyderabad Opium and Intoxicating Drugs (Amendment) Act, XXII of 1953.

The main contention of the appellant in the High Court was that the 1333-F Act had been repealed *in toto* on the introduction of the Dangerous Drugs Act, II of 1930 by the Opium and Revenue Laws (Extension of Application) Act,

XXXIII of 1950, and of the Drugs Act XXIII of 1940 by the Part B States (Laws) Act, III of 1951, and therefore there was no power in the Hyderabad Legislature to amend it by Act XXII of 1953. In consequence there was no law in force on the basis of which the Rules could be promulgated in 1962. Secondly, it was contended that even if the 1333-F Act did not stand repealed as above, the Rules framed by the State of Andhra Pradesh in 1962 with respect to chloral hydrate were not within the powers conferred by the 1333-F Act as amended in 1953, as chloral hydrate was not a narcotic or narcotic drug and was not covered by Item 51 of List II of the Seventh Schedule to the Constitution.

The petition was opposed on behalf of the State, and it contended that there was no repeal of the 1333-F Act by the introduction of the Dangerous Drugs Act 1930 and the Drugs Act, 1940, and consequently the amendment of the 1333-F Act by the Hyderabad Act XXII of 1953 was good, and the 1333-F Act as amended was in force in 1962 when the Rules were framed It was further contended that the Rules were *intra vires* the 1333-F Act as amended in 1953 as chloral hydrate was a narcotic and an intoxicating drug.

The High Court repelled the contentions raised on behalf of the appellant and dismissed the writ petition The appellant then applied for a certificate for leave to appeal to this Court, which was refused It then obtained Special Leave from this Court; and that is how the matter has come before us

Before we consider the points raised in the High Court which have also been raised before us, we should like to refer to certain provisions in the three Legislative Lists in the Seventh Schedule to the Constitution dealing with various aspects that arise in this case. The first of these provisions in Item 59, List I which deals with "cultivation, manufacture, and sale for export, of opium" Then there are two items in List II, Item 8 which deals with "intoxicating liquors, that is to say, the production, manufacture, possession, transport and sale of intoxicating liquors" and Item 51 which deals with

> "duties of excise on the following goods manufactured or produced in the State . :—(a) alcoholic liquors for human consumption, (b) opium, Indian hemp and other narcotic drugs and narcotics, but not including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry"

Lastly reference may be made to Item 19 of List III, which deals with "drugs and poisons, subject to the provisions of Entry 59 of List I with respect to opium"

It will be seen from a perusal of these entries that a substance may fall in a number of them. For example, opium falls under Item 59 of List I for certain purposes mentioned therein but also falls in Item 51 of List II for the purpose of duties of excise thereon and for such control as may be required for the purpose of collecting the duties of excise. Thus for the purpose of cultivation and manufacture opium is exclusively a Union subject but for the purpose of duties of excise it is an exclusive State subject Take another substance like chloral hydrate with which we are concerned in the present appeal It is undoubtedly a drug and therefore falls under Item 19 of List III. Drugs being in the Concurrent List both the Union and the States can legislate thereon There are two Central Acts which deal with drugs namely, the Dangerous Drugs Act, 1930 and the Drugs Act, 1940 Now a substance may fall under the Dangerous Drugs Act if it is so defined there It may also fall under the Drugs Act and may be subject to its provisions if so indicated therein. But at the same time a substance which is a drug may also fall under Item 51 of List II if it is a narcotic or is a narcotic drug Even intoxicating liquor which falls under Entry 8 of List II as well as under Entry 51 of List II may fall under Entry 19 of List III if it is a drug This will show that even if a substance is governed by the Dangerous Drugs Act and the Drugs Act it may well be liable to duties of excise under Entry 51 of List II and of such control as is incidental thereto. It is in this background that we have to consider the points raised on behalf of the appellant.

We now come to the first point raised on behalf of the appellant, namely, whether the 1333-F Act survived the introduction of the Dangerous Drugs Act and the Drugs Act in the State of Hyderabad. The 1333-F Act was in force in Hyderabad State as it was before the Constitution from 1924 At that time the State of Hyderabad was a sovereign State and had full power to deal with all subjects now contained in Lists I, II and III of the Seventh Schedule to the Constitution subject of course to British paramountcy and effect thereof on the sovereignty of the Hyderabad State. The 1333-F Act dealt with opium and intoxicating drugs. Intoxicating drugs were defined in this Act as meaning

"ganja, bhang, charas, cocaine and all such things which are prepared therefrom and will also include such intoxicating substances which the Government may, by gazette notification, include in it (section 2)."

This definition shows that besides the four substances mentioned therein, intoxicating drugs could include other substances if a notification was issued by the Government in that behalf We do not know as a fact whether any notification was issued after 1924 and before the Constitution came into force under this provision. But in any case the 1333-F Act applied not only to the four substances mentioned therein but also to others which might be notified. The 1333-F Act further provided that

"save as authorised under this Act or Rules thereunder, no person shall possess sellor manufacture opium or intoxicating drug (section 4)."

The Government was also given the power to make Rules regarding administration and supervision, grant of licences and collection of duties of excise, (section 5). The 1333-F Act also provided for punishment for the contravention of the Act and the Rules and for confiscation under certain circumstances (sections 7 to 11). It gave powers to excise officers for search of houses and arrest of accused persons, (section 16). It also provided for other powers for such officers (section 17). There were other provisions therein to which it is unnecessary to refer. It will be seen from this brief analysis of the 1333-F Act that it was in the nature of an excise Act and provided for licences and collection of duties of excise and made provisions incidental thereto. We have already said that this Act applied not only to opium and the four intoxicating drugs mentioned therein but also to other substances which might be notified thereunder. It continued in force in the Part B State of Hyderabad after the Constitution came into force in January, 1950.

In 1950, Parliament applied the Opium Act (XIII of 1857), the Opium Act (I of 1878) and the Dangerous Drugs Act (II of 1930) to the Part B State of Hyderabad by Central Act XXXIII of 1950. Section 4 of this Act *inter alia* provided that if immediately before the commencement of this Act there was in force in any Part B State, other than Jammu and Kashmir, any law corresponding to any of the Acts specified therein, that law would upon the commencement of this Act, stand repealed

The Dangerous Drugs Act deals with coca-leaf, coco derivative, hemp including bhang, siddhi, ganja, charas, medicinal hemp, opium and opium derivative It also gave power to Central Government to notify any other narcotic substance as a manufactured drug under certain circumstances The Dangerous Drugs Act thus deals, among others, with coca-leaf, hemp, opium and all manufactured drugs therefrom, though there is power in the Central Government to notify other substances The Act further provides for prohibition and control of these drugs. Further section 39 (1) lays down that

"nothing in this Act or in the Rules made thereunder shall affect the validity of any Provincial Act or an Act of any State Legislature for the time being in force, or of any Rule made thereunder, which imposes any restriction not imposed by or under this Act, or imposes a restriction greater in degree than a corresponding restrictions imposed by or under this Act, on the consumption of or traffic in any dangerous drug within India"

It will be seen that the Dangerous Drugs Act provides for prohibition or control, creates offences, provides for penalties and lays down procedure in that behalf. It is not an Act imposing duties of excise. Therefore, when this Act deals with

hemp, which includes ganja, bhang and charas, it does not deal with that aspect of hemp which is concerned with the imposition and collection of duties of excise on it and with incidental provisions in that behalf We have already said that a substance can come both under the Dangerous Drugs Act as well as under the Drugs Act and may also be liable to duties of excise under Entry 51 of List II of the Seventh Schedule. The fact that hemp is defined as a dangerous drug under this Act would not therefore in any way affect any law dealing with the imposition and collection of duties of excise on hemp Consequently when the Dangerous Drugs Act was introduced in the Part B State of Hyderabad in 1950, it could not affect that part of the 1333-F Act which dealt with ganja, bhang and charas, as intoxicating drugs and provided for grant of licences and collection of duties of excise thereon Similarly, with the introduction of the Dangerous Drugs Act, the operation of the 1333-F Act could not be affected with respect even to opium insofar as that Act dealt with grant of licence and collection of duties of excise thereon, though insofar as it dealt with manufacture of opium which comes under Entry 59 of List I, there was a repeal of the provisions relating to manufacture contained in the 1333-F Act and the Rules. We are therefore of opinion that the introduction of the Dangerous Drugs Act in the Part B State of Hyderabad in 1950 did not result in complete effacement of the 1333-F Act It remained alive even so far as opium, charas, bhang and ganja were concerned for the purpose of collection of duties of excise thereon It also remained alive with respect to other substances which might be notified as intoxication drugs under the 1333-F Act. If there was any such notification between 1924 and 1950 that notification would remain valid and the 1333-F Act would apply to it. If there was no such notification, the 1333-F Act would remain on the statute book as a conditional statute under which a notification in respect of any substance could be issued The argument that the introduction of the Dangerrous Drugs Act in 1950 completely repealed the 1333-F Act has no force and must fail.

Then we come to the Drugs Act of 1940 which was extended to the Part B State of Hyderabad by the Central Act III of 1951. Section 6 of the 1951-Act provides that

> "if immediately before the appointed day, there is in force in any Part B State any law corresponding to any of the Acts or Ordinances now extended to that State, that law shall, save as otherwise expressly provided in this Act, stand repealed "

It is not in dispute that chloral hydrate was controlled under the Drugs Act, and the argument on behalf of the appellant is that on the coming into force of the Drugs Act, the 1333-F Act so far as it applied to intoxicating drugs which could be notified thereunder, must be deemed to have been repealed We are of opinion that there is no force in this argument either The Drugs Act is mainly concerned with standard and quality of drugs manufactured in this country and therefore controls the manufacture, sale and distribution of drugs It has nothing to do with duties of excise and with their imposition on narcotics and narcotic drugs. We have already indicated that narcotics and narcotic drugs are to be found in Entry 51 of List II which provides for imposition of duties of excise on such drugs. If a substance is a narcotic drug, it is liable to be controlled under the Drugs Act as a drug. But at the same time it is liable to duties of excise under Entry 51 of List II, and such duties can be imposed only by State Legislature Further the State Legislature will have power to enact necessary provisions for the imposition and collection of duties of excise and for all incidental matters which might be necessary for such imposition and collection The fact that the Drugs Act was introduced in the Part B State of Hyderabad in 1951 would not therefore affect in any way that part of the 1333-F Act which dealt with collection of duties of excise and provided for licences in that connection. As we have said before, the 1333-F Act is more in the nature of an excise Act while the Drugs Act has nothing to do with the collection of duties of excise Further section 2 of the Drugs Act specifically provides that

> " the provisions of this Act shall be in addition to, and not in derogation of, the Dangerous Drugs Act, 1930, and any other law for the time being in force."

Therefore even if section 6 of the Central Act III of 1951 can be said to have repealed any provision of the 1333-F Act which is concerned with matters other than collection of duties of excise thereunder, that will not affect the later amendment made in the 1333-F Act by the Hyderabad Act No XXII of 1953, for that amendment will be treated as in addition to the provisions of the Drugs Act so long as the 1333-F Act was not completely dead before the Hyderabad Act XXII of 1953 was passed. We have already said when dealing with the Dangerous Drugs Act that the introduction of that Act could not be said to have completely repealed the 1333-F Act which dealt with matters not covered by the Dangerous Drugs Act at all (namely, collection of duties of excise and matters incidental thereto) The same in our opinion applies to the Drugs Act which did not deal at all with the collection of duties of excise on drugs covered by it Therefore the 1333-F Act in so far as it deals with the collection of duties of excise on any drugs which are narcotics or narcotic drugs would remain alive to that extent There can be no doubt therefore that the 1333-F Act continued in existence so far as it dealt with collection of duties of excise on substances covered by it and it could therefore be amended by Hyderabad Act XXII of 1953.

This brings us to the second point raised in the present appeal, namely, that even if the 1333-F Act had not been completely repealed by the introduction of the Dangerous Drugs Act and the Drugs Act and could be properly amended by the Hyderabad Act of 1953, the Rules were not within the power conferred by the Act. For that purpose we have to look at the 1333F Act as it stands after the amendment of 1953. The amended Act defines "intoxicating drugs" to mean (*i*) Indian hemp including all forms known as bhang, sendhi or ganja, (*ii*) charas, (*iii*) any mixture of the above or any drink prepared therefrom, and (*iv*) any other intoxicating and narcotic substance which the Government may by notification declare to be an intoxicating drug, such substance not being opium, coca leaf or a manufactured drug as defined in section 2, of the Dangerous Drugs Act. The amended Act is also clearly an excise Act as will be clear from the definition of "intoxicating drugs revenue" in section 2 (2) which means revenue from any duty, fee, tax, fine or confiscation imposed or ordered under the provisions of this Act. It was therefore open to the State Government to declare by notification any substance as an intoxicating drug within the meaning of the Act provided it was an intoxicating and narcotic substance. If such a declaration is made, the substance will be liable to excise duty under the amended Act and the Rules framed thereunder and will be liable to such incidental control as may be necessary for the collection of duties Further, drugs being in the Concurrent List, the provisions of the 1953 Amendment Act will also be a law under Item 19 of List III and will be in addition to the Drugs Act of 1940 by virtue of section 2 thereof. Now it appears that chloral hydrate has been notified by the Government of Andhra Pradesh as an intoxicating drug within the meaning of the amended Act It was thereafter that the Rules were framed The Rules provide for the manufacture of chloral hydrate under a licence and for payment of duties of excise of Rs 500 per year on such manufacture. They also provide for possession, sale, import, export and transport. If chloral hydrate is a narcotic drug or a narcotic within the meaning of Entry 51 of List II of the Seventh Schedule and is an intoxicating drug and narcotic substance within the meaning of section 2 (1) (*iv*) of the amended Act, it could be notified under the amended Act and on such notification it would be liable to excise duty and to such incidental control as may be necessary for the purpose of collection of excise duty. We are in the present case mainly concerend with the grant of licence and imposition of excise duty of Rs 500 per annum. If chloral hydrate is an intoxicating and narcotic substance, the Rules could be framed with respect to its control and the appellant could be asked to take out a licence and pay excise duty on the manufacture thereof, even though chloral hydrate may be a drug which is controlled under the Drugs Act.

The case of the State Government in this connection is that chloral hydrate is a narcotic drug or a narcotic within the meaning of Entry 51 of List II of the Seventh

Schedule. Its further case is that it increases intoxication if mixed with liquor and that it is being produced in large quantities in order that it may be mixed with liquor. That is the reason why the State has framed the Rules to control the production of chloral hydrate. The appellant in its writ petition admitted that chloral hydrate was used in small doses as a hypnotic and sedative Now the dictionary meaning of the word "narcotic" is a substance which relieves pain, produces sleep, and in large doses brings on stupor, coma, and even death, as opium, hemlock, alchol etc. Obviously, therefore, if chloral hydrate is hypnotic and sedative as admitted by the appellant, it would be a narcotic The appellant however relies on the statement in the affidavit filed on behalf of the State to show that chloral hydrate is not a narcotic or a narcotic drug, within the meaning of Entry 51 of List II, for if it is not a narcotic or a narcotic drug within that meaning no duty of exicse can be imposed by the State Legislature thereon. The part of the affidavit on behalf of the State relied upon by the appellant was dealing with a vague allegation of the appellant that chloral hydrate was a medicinal preparation In that connection it was submitted on behalf of the State that chloral hydrate was not a medicinal or toilet preparation coming within the definition of the Medicinal and Toilet Preparations (Excise Duties) Act, XVI of 1955 "as this substance in a finished form does not contain either alcohol, opium, Indian hemp or other narcotic drug or narcotics." These last words were taken from the schedule to the Act of 1955 which mentions any medicinal preparation not containing alcohol but containing opium, Indian hemp or other narcotic drug or narcotic In the 1955-Act narcotic drug or narcotic has been defined as meaning a substance (other than alcohol) which when swallowed or inhaled by, or injected into, a human being induces drowsiness, sleep, stupefact tion or insensibility in the human being and which is a dangerous drug within the meaning of the Dangerous Drugs Act, 1930. Obviously, therefore, the words "narcotic drug" and "narcotic" used in the 1955-Act have a special meaning and this was all that was intended when in the affidavit filed by the State these words were used But all narcotics or narcotic drugs are not covered by the Dangerous Drugs Act and there can be narcotics and narcotic drugs which are not covered by the Dangerous Drugs Act. There can be no other conclusion on the evidence in the present case than that chloral hydrate is a narcotic or a narcotic drug within the meaning of Entry 51 of List II of the Seventh Schedule It also has intoxicating effect when mixed with liquor and so is an intoxicating drug within the meaning of the amended Act.

The appellant also relies on the Medicinal and Toilet Preparations (Excise Duties) Act, XVI of 1955, in this Court It is true that the appellant stated in its writ petition that it was holding a licence under the 1955-Act; but there was no clear averment in the petition that chloral hydrate was being manufactured as a medicinal preparation under the 1955-Act. The licence which has been produced shows that chloral hydrate being manufactured under the Drugs Act and the Rules framed thereunder. Further the judgment of the High Court shows that no argument was raised before it to the effect that chloral hydrate was a medicinal preparation under the 1955-Act. In the circumstances we are not prepared to allow the appellant to raise this point for the first time before us, even though there was some kind of denial on this point by the State Government in its affidavit to which we have already referred.

In the result the appeal fails and is hereby dismissed with costs.

K.G.S. *Appeal dismissed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction )

PRESENT —J C SHAH, V RAMASWAMI AND V. BHARGAVA, JJ.

Commissioner of Income-tax, Madras .. *Appellant**

*v.*

Sri Meenakshi Mills, Ltd , Madurai and Others .. *Respondents.*

*Income-tax Act (XI of 1922), sections 4 and 42 (1)—Income—Deemed accrual within taxable territories—Money lent at interest outside taxable territories—Taking such money into taxable territory—Knowledge of lender and borrower—To be an integral part of the transaction—Assessee-companies and a bank having branches within and without taxable territories—Same director in the two entities, occupying a special position—Profits of assessee outside taxable territory deposited in branch of the bank outside taxable territory—Borrowal by assessee from the bank situate within taxable territory on such deposits—Transmission of funds—Assessee a major shareholder in the bank—Knowledge of arrangement or scheme—Assessability of interest*

*Company and shareholders—Corporate personality—Piercing the veil—When permissible*

The assessee-companies, engaged in the manufacture and sale of yarn at Madurai, had a branch at Pudukottai ( a Native State then) The sale proceeds of the branch were deposited in the branch of the Madurai Bank at Pudukottai and these deposits earned interests. The assessee companies borrowed monies from the Madurai branch of the bank on the securityof the fixed deposits made by their branches with the Pudukottai branch of the bank It is the admitted case that the loans granted to the assessees were far in excess of the available profits at Pudukottai The department held that under section 42 (1) of the Income-tax Act the entire interest income earned on the fixed deposits were assessable The Tribunal in the appeal took note of the position that the head office and the branch—whether of the assessee or of the bank—constituted only one unit and that one *T* a director occupied a special position in both the concerns and the establishment of the branch of the bank at Pudukottai was intended to help the financial operations of *T* in the concerns in which he was interested The Tribunal held that section 42 (1) was applicable and that the assessees must be attributed with knowledge of the activity of their branches at Pudukottai and of the remittances made by the Pudukottai branch of the bank to Madurai head office and that the entire transactions formed part of an arrangement or scheme. But the High Court in answering the reference in favour of the assessee held that there was no such arrangement between the parties The Revenue appealed

*Held*, that, the entire interest earned on the fixed deposits was rightly taxable under section 42 (1) of the Act

The requirements under section section 42 (1) are, that any money should have been lent at interest outside the taxable territory, income, profits or gains should accrue or arise directly or indirectly from such money so lent at interest and that the money should be brought into the taxable territories in cash or in kind If all these coditions are fulfilled, then the section lays down that the interest shall be deemed to be income accruing or arising within the taxable territories The knowledge of the lender and the borrower that the money is to be taken into British India must be an integral part of the transaction

It is true that from the juristic point of view the company is a legal personality entirely distinct from its members and the company is capable of enjoying rights and being subjected to duties which are not the same as those enjoyed or borne by its members But in certain exceptional cases the Court is entitled to lift the veil of corporate entity and to pay regard to the economic realities behind the legal facade For example, the Court has power to disregard the corporate entity if it is used for tax evasion or to circumvent tax obligation

The High Court in reference must accept the findings of fact reached by the Appellate Tribunal.

*Held on facts*, The Tribunal was right in its conclusion that there was a basic arrangement or scheme between the assessees and the bank The Tribunal found that the assessees had a prepon-derant, if not the whole, voice in the creation, running and management of the bank and that Pudukottai was neither a cotton producing area nor had it a market for cotton and except that it was a non-taxable territory there was nothing else to recommend the carrying on of the cotton spinning or weaving business there Having regard to the special position of *T* and the balance-sheets

* C.As. Nos. 1084 to 1097 of 1965. 25th October, 1966.

of the bank and lack of investments in Pudukottai, the Tribunal had reasons to conclude that the bank itself was started at Madurai and a branch was opened at Pudukottai only with a view to helping the financial operations of *T* and the mills in which he was vitally interested The Tribunal also found that the Pudukottai branch of the bank transmitted funds deposited by the assessee for enabling the Madurai branch to advance loans at interest to the assessee-companies and the transmission of the funds was made with the knowledge of the assessee-companies who were the majority share-holders of the bank In the context of these facts it must he held that the entire transactions formed part of a basic arrangement or scheme between the creditor and the debtor that the money should be brought into British India after it was taken by the borrower outside the taxable territory. In a matter of this description the Revenue is entitled to pierce the veil of corporate entity and to look at the reality of the transaction The High Court had erred in law in interfering with the findings of the Appellate Tribunal

Appeals by Special Leave from the Judgment and Order dated the 8th January, 1963, of the Madras High Court in Tax Case No 108 of 1960 [1]

*B. Sen*, Senior Advocate, (*A N Kripal, S P Nayyar* and *R N Sachthey*, Advocates, with him), for Appellant.

*R. Venkataraman* and *R Ganapathy Iyer*, Advocates, for Respondents.

The Judgment of the Court was delivered by

*Ramaswami, J*.—These appeals are brought by Special Leave from the judgment of the High Court of Madras dated 8th January, 1963, in Tax Case No. 108 of 1960.

All the three respondents (hereinafter called the "assessee-companies") are public limited companies engaged in the manufacture and sale of yarn at Madurai. Each of the assessee-companies had a branch at Pudukottai engaged in the production and sale of cotton yarn The sale-proceeds of the branches were periodically deposited in the branch of Madurai Bank Ltd (hereinafter referred to as the "bank") at Pudukottai, a former Native State either in the current accounts or fixed deposits which earned interest for the various assessment years as follows :—

| *Assessment Years* | *Meenakshi Mills Rs* | *Rajendra Mills Rs* | *Saroja Mills Rs* |
|---|---|---|---|
| 1946-47 | 1,08,902 | | 25,511 |
| 1947-48 | 1,18,791 | 24,953 | 30,620 |
| 1948-49 | 1,50,017 | 33,632 | 36,890 |
| 1949-50 | | 42,369 | 41,393 |
| 1950-51 | 1,27,314 | 41,957 | 42,092 |

The bank aforesaid was incorporated on 8th February, 1943, with Thyagaraja Chettiar as founder-director, the head office being at Madurai Out of 15,000 shares of this bank issued, 14,766 were held by Thyagaraja Chettiar, his two sons and the three assessee-companies as shown below :

| | | *Share holding.* |
|---|---|---|
| 1 | Thyagaraja Chettiar | 1,008 |
| 2. | Manickavasagam | 250 |
| 3 | Sundaram | 250 |
| 4. | Meenakshi Mills | 5,972 |
| 5 | Rajendra Mills | 3,009 |
| 6. | Saroja Mills | 4,177 |

All the three assessee-companies borrowed moneys from the Madurai branch of the bank and on the security of the fixed deposits made by their branches with the Pudukottai branch of the bank It is the admitted case that the loans granted to the assessee-companies were far in excess of the available profits at Pudukottai. In the assessment proceedings of the assessee-companies for the various years under dispute, the Income-tax Officer was of the view that the borrowings in British India

1. (1963) 2 M L.J. 199. (1963) 2 I.T.J. 111.

on the security of the fixed deposits made at Pudukottai amounted to constructive remittances of the profits by the branches of the assessee-companies to their head offices in India within the meaning of section 4 of the Indian Income-tax Act, 1922 (hereinafter called the " Act "). Accordingly he included the entire profits of the assessee-companies including the interest receipts from the Pudukottai branches in the assessment of the assessee-companies, since the overdrafts availed of by the assessee-companies in British India far exceeded the available profits The assessee-companies appealed to the Appellate Assistant Commissioner of Income-tax. After examining the constitution of the assessee-companies and the bank and the figures of deposits and overdrafts, the Appellate Assistant Commissioner found that the deposits made by the assessee-companies and other companies closely allied to them formed a substantial part of the total deposits received by the bank He was also of the view that the Pudukottai branch of the bank had transmitted the funds so deposited for enabling the Madurai branch to advance loans at interest to the assessee-companies and that the transmissions of the funds were made with the knowledge of the assessee-companies who were major share-holders of the bank The Appellate Assistant Commissioner also considered that the Pudukottai branch of the bank had no other appreciable transactions except the collection of funds and on the facts found, section 42 (1) of the Act applied to the case. The assessee-companies took the matter in appeal to the Appellate Tribunal which took note of the position that the head office and the branch—whether of the assessee-companies or of the bank—constituted only one unit and that Thyagaraja Chettiar occupied a special position in both the concerns and the establishment of the branch of the bank at Pudukottai was intended to help the financial operations of Thayagaraja Chettiar in the concerns in which he was interested After detailed consideration of the deposits and overdrafts and the inter-branch transactions of the bank the Appellate Tribunal held that section 42 (1) of the Act was applicable to the facts of the case and that the assessee-companies must be attributed with the knowledge of the activity of their branches at Pudukottai and of the remittances made by the Pudukottai branch of the bank to Madurai head office, and that the entire transactions formed part of an arrangement or scheme.

In the course of its judgment, the Appellate Tribunal observed as follows :

" Even so, it seems to us we cannot escape that fact that Thyagaraja Chettiar, his two sons and the three mills had a preponderant, if not the whole, voice in the creation, running and management of the bank We cannot also forget that Pudukottai is neither a cotton producing area nor has a market for cotton, except that it was a non-taxable territory, there was nothing else to recommend the carrying on of the business in cotton spinning or weaving there There is yet another aspect to which our attention was drawn by the learned Counsel for the assessee That being a non-taxable area, there were many very rich men there with an influx of funds, to invest in banks and industries By the same token, it appears to us it was not necessary for the Madurai Bank which was after all a creation of certain people which started with a small capital of Rs 32,800 to have gone to Pudukottai for opening a branch If there was an influx of money in Pudukottai because of the finances, nobody would have agreed to borrow money from it At any rate, it is clear it would have had no field for investment in Pudukottai the only source of investment being outside Pudukottai "

The Appellate Tribunal further stated :

"But having regard to the special position of Thyagaraja Chettiar and the balance-sheets of the bank referred to above and the lack of investments in Pudukottai itself of the moneys borrowed there, it seems more reasonable to conclude that the bank itself was started at Madurai and a branch of it was opened at Pudukottai only with a view to help the financial operations of Thyagaraja Chettiar and the mills in which he was vitally interested "

At the instance of the assessee-companies the Appellate Tribunal referred the following question of law for the determination of the High Court :

" Whether on the facts and in the circumstances of the case, the taxing of the entire interest earned on the fixed deposits made out of the profits earned in Pudukottai by the assessee's branches in the Pudukottai branch of the Bank of Madurai is correct?"

The High Court answered the question in favour of the assessee-companies holding that it was not established that there was any arrangement between the assessee-companies and the bank whether at Pudukottai or at Madurai for transference of moneys from Pudukottai branch to Madurai and the facts on record

did not establish that there was any transfer of funds between Pudukottai and Maudrai for the purpose of advancing moneys to the assessee-companies The High Court further took the view that the transactions represented ordinary banking transactions and there was nothing to show that the amounts placed in fixed deposits in the branch were intended to and were in fact transferred to the head office for the purpose of lending them out to the depositor himself.

On behalf of the appellant Mr. Sen submitted at the outset that the High Court was not legally justified in interfering with the findings of fact reached by the Appellate Tribunal and in concluding that there was no arrangement or scheme between the lender and the borrower for the transference of funds from Pudukottai to Madurai. In our opinion, there is justification for the argument put forward on behalf of the appellant and the High Court erred in law in interfering with the findings of the Appellate Tribunal in this case In *India Cements, Ltd* v *Commissioner of Income-tax, Madras*[1], it was pointed out by this Court that in a reference the High Court must accept the findings of fact reached by the Appellate Tribunal and it is for the party who applied for a reference to challenge those findings of fact first by an application under section 66 (1) If the party concerned has failed to file an application under section 66 (1) expressly raising the question about the validity of the findings of fact, he is not entitled to urge before the High Court that the findings are vitiated for any reason We therefore proceed to decide the question of law raised in these appeals upon the findings of fact reached by the Appellate Tribunal.

Section 42 of the Act states as follows :

"All income, profits or gains accruing or arising whether directly or indirectly through or from any money lent at interest and brought into the taxable territories in cash or in kind ... shall be deemed to be income accuring or arising within the taxable territories . . . ."

This section accordingly requires, in the first place, that any money should have been lent at interest outside the taxable territory In the second place, income, profits or gains should accrue or arise directly or indirectly from such money so lent at interest, and, in the third place, that the money should be brought into the taxable territories in cash or in kind If all these conditions are fulfilled, then the section lays down that the interest shall be deemed to be income accruing or arising within the taxable territories This section was the subject-matter of interpretation by the Federal Court in *A. H Wadia* v *Commissioner of Income-tax, Bombay*[2]. It was held by the majority of the Judges in that case that the provision in section 42 (1) of the Act, which brings within the scope of the charging section interest earned out of money lent outside, but brought into British India was not *ultra vires* the Indian Legislature on the ground that it was extra-territorial in operation It was pointed out that the section contemplated the bringing of money into British India with the knowledge of the lender and borrower and this gave rise to a real territorial connection The learned Chief Justice took the view that the nexus was the knowledge to be attributed to the lender that the borrower had borrowed money for the purpose of taking it to British India and earning income on that money. Mukherjea and Mahajan, JJ, took a somewhat different view Mahajan, J, considered that there must be an arrangement between the lender and the borrower to bring the loan into British India, and Mukherjea, J, further emphasised the point by stating that it must be the basic arrangement underlying the transaction that the money should be brought into British India after it is taken by the borrower outside his territory. But all the learned Judges agreed that the knowledge of the lender and the borrower that the money is to be taken into British India must be an integral part of the transaction That is the ratio of the decision of the Federal Court with regard to the construction of section 42 (1) of the Act.

Having examined the findings of the Appellate Tribunal in the present case we are satisfied that the test prescribed by the Federal Court in *Wadia's case*[2], is fulfilled

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1 (1966) 1 I T J 50 (1966) 1 M L J (S C) 31 (1966) 1 An W R (S C) 31 (1966) 1 S C.J. 108.

2 (1949) 1 M L J 335 (1949) F L J 18 : (1948) F L.R. 121

and the Appellate Tribunal was right in its conclusion that there was a basic arrangement or scheme between the assessee-companies and the bank that the money should be brought to British India after it was taken by the borrower outside the taxable territory. The Appellate Tribunal has pointed out that the assessee-companies had a preponderant, if not the whole, voice in the creation, running and management of the bank and that Pudukottai was neither a cotton producing area nor had it a market for cotton and except that it was a non-taxable territory there was nothing else to recommend the carrying on of the cotton spinning or weaving business there The Tribunal further remarked that having regard to the special position of Thyagaraja Chettiar and the balance-sheets of the bank and lack of investments in Pudukottai, it was reasonable to conclude that the bank itself was started at Madurai and a branch was opened at Pudukottai only with a view to helping the financial operations of Thyagaraja Chettiar and the mills in which he was vitally interested. The Tribunal found that Pudukottai branch of the bank had transmitted funds deposited by the assessee-companies for enabling the Madurai branch to advance loans at interest to the assessee-companies and the transmission of the funds was made with the knowledge of the assessee-companies who were the major shareholders of the bank In the context of these facts it must be held that the entire transactions formed part of a basic arrangement or scheme between the creditor and the debtor that the money should be brought into British India after it was taken by the borrower outside the taxable territory. We are accordingly of the opinion that the principle laid down in *Wadia's case*[1], is satisfied in this case and that the Income-tax Authorities were right in holding that the entire interest earned on fixed deposits was taxable.

In the course of argument Mr. Venkataraman contended that even if Thyagaraja Chettiar, a director of the assessee-companies, knew in his capacity as director of the Madurai Bank that money placed in fixed deposit by the assessee-companies would be transferred to the taxable territory, that knowledge cannot be imputed to the assessee-companies and so it cannot be said that the transfer was part of an integral arrangement of the loan transaction In support of this argument learned Counsel referred to the decision of the Court of Appeal in *DavidPayne & Co., Ltd , In re:Young* v *David Payne & Co , Ltd*[2]. We are unable to accept the argument of the respondents as correct. The decision in *David Payne & Co 's case*[2], has no bearing on the question presented for determination in the present case In *David Payne & Co 's case*[2], the question at issue related to the powers and duties of directors and it was held that because the same person is a common director of two companies, the one company has not necessarily notice of everything that is within the knowledge of the common director, which knowledge he has acquired as director of the other company In the present case the question at issue is entirely different The Appellate Tribunal has, upon examination of the evidence, found that the transference of funds from Pudukottai to Madurai was made as part of the basic arrangement between the bank and the assessee-companies and that Thyagaraja Chettiar who was the moving figure both in the bank and in each of the assessee-companies had knowledge of this arrangement It is well-established that in a matter of this description the Income-tax Authorities are entitled to pierce the veil of corporate entity and to look at the reality of the transaction It is true that from the juristic point of view the company is a legal personality entirely distinct from its members and the company is capable of enjoying rights and being subjected to duties which are not the same as those enjoyed or borne by its members But in certain exceptional cases the Court is entitled to lift the veil of corporate entity and to pay regard to the economic realities behind the legal facade For example, the Court has power to disregard the corporate entity if it is used for tax evasion or to circumvent tax obligation. For instance, in *Apthorpe* v *Peter Schoenhofen Brewing Co*[3], the Income-tax Commissoners had found as a fact that all the property of the New York company, except its land, had been transferred to an English

1. (1949) 1 M L J 335 : (1948) F C R. 121 . (1949) F.L J. 18.
2. L R (1904) 2 Ch D 608.
3. (1899) 4 T C. 41.

company, and that the New York company had only been kept in being to hold the land, since aliens were not allowed to do so under New York law. All but three of the New York company's shares were held by the English company, and, as the Commissioners also found, if the business was technically that of the New York company, the latter was merely the agent of the English company. In the light of these findings the Court of Appeal, despite the argument based on *Soloman's case*[1], held that the New York business was that of the English company which was liable for English income-tax accordingly In another case—*Firestone Tyre & Rubber Co.* v. *Llewellin*[2]—an American company had an arrangement with its distrubutors on the Continent of Europe whereby they obtained supplies from the English manufacturers its wholly owned subsidiary The English company credited the American with the price received after deducting the costs plus 5 per cent. It was conceded that the susidiary was a separate legal entity and not a mere emanation of the American parent, and that it was selling its own goods as principal and not its parent's goods as agent. Nevertheless, these sales were a means whereby the American company carried on its European business, and it was held that the substance of the arrangement was that the American company traded in England through the agency of its subsidiary. We, therefore, reject the argument of Mr. Venkataraman on this aspect of the case.

For the reasons expressed we hold that the question referred to the High Court by the Appellate Tribunal must be answered in favour of the Income-tax Department and against the respective assessee-companies and these appeals must be allowed with costs.

V.S. *Appeals allowed.*

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THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—K SUBBA RAO AND V RAMASWAMI, JJ.

The Ellerman and Bucknall Steamship Co , Ltd. .. *Appellant**

*v*

Sha Misrimal Bherajee .. *Respondent.*

*Common Carriers—Shipowners—Aware of contract between buyer and seller—Goods to be packed in 'new' fibre drums—Shipment of the goods packed in ' old ' drums—Bill of lading merely stating ' goods packed in drums in good order and condition '—Clean bill of lading—At request of and against indemnity given by the seller—Liability in tort (deceit)*

*Words and Phrases —' Letter of credit ', ' clean bill of lading'*

The High Court of Madras in C C C A No 61 of 1957 found, agreeing with the Court below, that the shipowners-appellants herein gave a clean bill of lading with the knowledge that it would be negotiated while, as a matter of fact, only unclean bill of lading should have been given The buyer-respondent was damnified by such misrepresentation found in the bill of lading and the Court decreed the entire claim in the suit for damages Hence the instant appeal to the Supreme Court

The following grounds of appeal were preferred *inter alia* (i) while the respondent based the claim on contract the High Court has granted a decree in tort (deceit) , (ii) the appellant was not in duty or obligation bound to mention in the bill of lading that the packing was in 'old' drums and the non mention of the fact could not have misled the Bank in paying, against shipping documents, under the letter of credit, and (iii) the bills of lading were clean ones, for the oldness or the newness of the drums had no impact on the contents thereof (which gave rise to the damages).

*Held* A perusal of the plaint discloses that the appellant was sought to be made liable both in contract and in tort The claim on the basis of misrepresentation was made in the plaint (para 9), denied by the appellant in his written statement, issue raised and argued in both the Courts below Therefore there is no merit in the first contention

In terms of the contract, the appellant had delivered the goods ' in the like good order and condition in which their shipment was made' No liability for any damages to the buyer on the basis of breach of any term of the contract could arise

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1. L.R (1897) A C. 22
2. (1957) 1 W.L R. 464.

* C A. No. 247 of 1964. 29th March, 1966.

'Letter of credit' is a promise by the banker to pay money to the seller in return for the shipping documents. It is opened on conditions on which the request (by the buyer) is made and the banker can only negotiate the shipping documents if the conditions are strictly complied with. Normally a credit for a 'bill of lading' means it is for a 'clean bill of lading'

A clean bill of lading is 'one which does not contain any reservation as to the apparent good order and condition of the goods or the packing'. A statement that the goods were 'shipped in good order and condition' in the bill of lading without any clause or notation modifying or qualifying it is a 'clean bill of lading'.

In the instant case, despite the fact that the appellant knew of the contract for packing in 'new' fibre drums still the appellant gave a clean bill, dropping the word 'old' before drums—see Mate's receipt showing the goods were packed in old drums, the representation was intended obviously for the purpose of operating on the credit with the bank in collusion with the seller. Having regard to terms of the indemnity bond given by the seller to the appellant against any consequence of said representation the collusion is apparent. Herein all the elements of 'deceit' is present The High Court was therefore right in holding the appellant liable in damages for the loss sustained by the respondent

*Held further*, the contention that the shipowners were not bound by the representation made by the ship's mate was not raised uptil now and cannot be allowed to be raised now, also the question whether in view of the respondent having obtained a decree against the seller the present suit is not maintainable cannot be raised for the same reason The contention that the 'bill of lading' is governed by the American law cannot be allowed to be raised for, what American law is, relates to a question of fact and as there are no materials on record to decide the same this point also is not allowed to be raised.

Appeal from the Judgment and Decree, dated the 3rd November, 1960 of the Madras High Court in C C.C Appeal No 61 of 1957

*A. K. Sen*, Senior Advocate (*V. Bhagat* and *D. N. Gupta*, Advocates, with him), for Appellant

*S. T Desai*, Senior Advocate (*Kesawlal Tarwady* and *R Ganapathy Iyer*, Advocates, with him), for Respondent.

The Judgment of the Court was delivered by

*Subba Rao, J.*—The appellant, Ellerman Bucknall Steamship Company, Ltd hereinafter called the shipowners, are a limited liability company incorporated under the law in the United Kingdom carrying on business as common carriers by sea. They own a ship named "*City of Lucknow*". Messrs. Best & Co., Ltd. having their office at Madras, are the local agents of the shipowners.

Sha Misrimal Bherajee, the respondent herein, hereinafter called the buyer, entered into two contracts with the British Mercantile Company, Limited, New York, hereinafter called the seller, for the purchase of Fresh Monsanto Polystyrene Injection Moulding Powder (not reground) in grannles manufactured by Monsanto Chemical of New York In respect of the first contract, the purchaser placed two indents dated 26th December, 1950, and 27th December, 1950, for the said stuff of value Rs 13,500 and Rs 6,750 respectively. The buyer entered into a second contract with the seller for the purchase of 24 drums of the same material of the value of Rs 16,000 under an indent dated 23rd January, 1951 In respect of the first contract and indents the buyer opened and confirmed an irrevocable Letter of Credit No 4748 dated 28th December, 1950, for U S $4,535 plus war risk with the Eastern Bank Limited In regard to the second contract he opened another irrevocable Letter of Credit No 5012 dated 31st January, 1951, for U.S. $ 3,330 As the said Bank had no branch of its own at New York, it arranged with the Marine Midland Trust Company of New York for payment of the bills that might be presented by the seller in New York. Pursuant to the said contracts, the seller delivered to the shipowners certain consignments in reused fibre drums. The bills of lading issued by the shipowners described the drums simply as drums. After taking a letter of indemnity to cover against any loss, the shipowners issued clean bills of lading. The seller negotiated the bills of lading with the Marine Midland Trust Company, New York, and obtained payment of U.S. $ 6,998 75 under the letters of credit Thereafter, the bills of lading were forwarded to the

Eastern Bank, Limited, Madras, and the buyer paid to the said Bank a sum of Rs. 33,012-5-9 against the said letters of credit. When the shipment arrived it was discovered that the goods sought to be delivered did not answer the description given in the documents Indeed, the drums contained only coal dust and factory shavings. The buyer took appropriate proceedings against the seller in the American Courts and realized a sum of Rs 13,604-9-0 Thereafter, he instituted the present suit in the City Civil Court, Madras, for the recovery of a sum of Rs. 23,760-15-6 against the Bank as well as the shipowners To that suit the Bank was made the 1st defendant and the shipowners, the 2nd defendant Broadly stated, the basis of the claim against the Bank was that, though under the letters of credit the Bank had the authority to pay only against clean bills of lading, it paid against unclean bills of lading. The cause of action against the shipowners was that they made a misrepresentation that the bills of lading were clean whereas in fact they were not so, with the result, acting on that misrepresentation, the agent of the Bank paid against the said bills of lading which it would not have done had it known the real facts.

The learned City Civil Judge held that the bills of lading were clean ones but in respect of one of the letters of credit the Bank should not have accepted the shipping documents which related only to a part of the goods contracted for On that finding the learned Judge held that the Bank was liable to refund the amount paid only under one of the letters of credit. As against the shipowners he came to the conclusion that even if the bills were not clean, the Bank would nevertheless have paid the amount, as the terms of the letters of credit were comprehensive enough to authorize such payments In the result, he dismissed the suit against the shipowners but decreed it in part against the Bank The Bank and the shipowners preferred appeals to the High Court against the said decree in so far as it went against each of them.

The appeals were heard by a Division Bench of the Madras High Court The learned Judges of the High Court came to the conclusion that the shipowners with the knowledge that the bills of lading would be negotiated gave, at the request of the seller, clean bills of lading while as a matter of fact only unclean bills of lading should have been given They further held that the purchaser was damnified, as on the basis of the misrepresentation found in the bills of lading the Bank paid the amount against the shipping documents which it would not have done if it had known that the bills of lading were unclean. In the result, they gave a decree for the entire suit claim against the shipowners They allowed C C C A No 61 of 1957 against the shipowners but dismissed it against the Bank. C C C.A No 54 of 1957, the appeal filed by the Bank, was allowed. The shipowners have preferred the present appeal against the decree given by the High Court against them.

The argument of Mr. A K Sen, learned Counsel for the appellant, may broadly be placed under the following three heads. (1) While the respondent based his cause of action on a breach of contract, the High Court gave the relief founded on deceit , (2) under common law or contract the appellant had no duty or obligation to make a statement in the bills of lading that the drums were old ones and, therefore, the non-mention of that fact could not have misled the Bank into paying against the shipping documents under the letters of credit, and (3) the bills of lading were clean ones, for the oldness or newness of drums had no real impact on the contents thereof, for both were equally suitable containers of the articles to be supplied

Mr. S. T Desai, learned Counsel for the respondent, while he made a faint attempt to sustain the decree of the High Court on the basis of the breach of contract, seriously sought to support it on the doctrine of deceit He argued that there was a fraudulent misrepresentation by the appellant in collusion with the seller to the effect that the bills of lading were clean while in fact they were not and that, acting on that misrepresentation, the Bank, through its agent at New York, paid the amount to the seller under the letters of credit against the shipping documents, which it would not have done if such a misrepresentation had not been made He countered

the contentions of the learned Counsel for the appellant that the High Court gave a decree on a cause of action different from that on which the plaint was based.

The first contention turns upon the pleadings as well as on the conduct of the parties during the trial and the appeal.

A perusal of the plaint discloses that the 2nd defendant was sought to be made liable both in contract and in tort Paragraph 9 of the plaint reads thus

"If the first defendants state that they acted on the terms of the bills of lading and are therefore protected, the plaintiffs also charge that in any event the second defendants are liable for issuing the bills of lading without disclosing the true state of facts and for inserting statements in the bills of lading which are now admitted to be untrue The plaintiffs also charge that the defendants are precluded from denying the correctness of the statement in the bills of lading as regards the apparent good order and condition as mentioned in the bills of lading The plaintiffs charge that the second defendants and the shippers acted collusively with a view to enable if possible the shippers to obtain moneys against goods which were not the goods agreed to be sold and which were not consigned according to the contract The very fact that the second defendants have obtained an indemnity for issuing the bills of lading without disclosing the real state of facts, would show their consciousness that they were not right in issuing the bills of lading in the terms they did and whatever their rights as against the shippers may be on the indemnity, the plaintiffs are not concerned with the same, but the second defendants are liable to the plaintiffs to make good the loss resulting by reason of a representation acted on by which the plaintiffs have been damnified."

This passage in the plaint contains all the necessary allegations to sustain a claim in tort It is clear, therefore, that the claim of the buyer against the shipowner. was also based upon the misrepresentation made by the latter in the bills of ladings In the written statement the appellant denied the allegations in para 9 of the plaint and stated that there was no secret arrangement between them and the seller in regard to the goods or the containers The shipowners also denied that they inserted any untrue statement in the bills of lading acting in collusion with the seller to enable the latter to obtain money against the bills of lading. Issue 6 framed by the learned City Civil Judge reads.

"Did the second defendant act *bona fide* throughout in issuing the bills of lading and in taking an indemnity from the shippers?"

The judgment of the learned City Civil Judge discloses that the question of misrepresentation by collusion was argued and the learned Judge held that the Bank was not misled, as under the letters of credit it had to pay the amount against the bills of lading, whether clean or unclean Before the High Court also the question of misrepresentation by the shipowners was expressly raised and was accepted by it We cannot, therefore, agree with the contention of the learned Counsel for the appellant that the High Court had made out a new case which was not raised in the plaint, indeed, the claim on the basis of misrepresentation was made in the plaint, denied by the appellant in the written statement and argued in both the Courts below There are, therefore, no merits in the first contention

On the question of the appellant's liability to the buyer in contract, we are satisfied that there is no basis for it Indeed, learned Counsel for the respondent did not seriously press the point, though he did not give it up altogether

A bill of lading serves three purposes, *viz* , (i) it is receipt for the goods shipped containing the terms on which they have been received; (ii) it is evidence of the contract for carriage of goods, and (iii) it is a document of title for the goods specified therein The contract of the shipowners in the bill of lading is that they will deliver the goods at their destination " in the like good order and condition " in which they were when shipped. In terms of the contract the shipowners delivered the goods to the buyer in the drums The consignee incurred damages not because of any defect in the drums but because the seller sent goods different from those he had agreed to sell to him Therefore, the shipowners were not liable for any damages to the purchaser on the basis of breach of any of the terms of the contract No further elaboration on this point is called for, as finally this point was not seriously pressed by the learned Counsel for the respondent

Now we shall consider the main point raised in the appeal, namely, the liability of the appellant in tort Before we advert to the question of law it would be convenient to notice the relevant facts.

Exhibit A-1 dated 26th December, 1950, is the indent placed by the buyer with the seller in respect of Fresh Monsanto Polystyrene Injection Moulding Powder of value of Rs 13,500 The packing was to be in new fibre drums each containing 250 lbs nett Exhibit A-2 is another indent dated 27th December, 1950, placed by the buyer with the seller The quantity required thereunder was of the value of Rs 6,750 and the packing was to be in new fibre drums each containing 250 lbs nett Exhibit A-5 is the third indent dated 23rd January, 1951, for the same goods worth Rs 16,500 with similar terms The buyer opened two letters of credit, Exhibits B-1 and B-2, with the Eastern Bank, Limited, Madras, for U S $7,625 Exhibits B-28 and B-29 are the letters written by the Eastern Bank, Limited, Madras to the Marine Midland Trust Company, New York, to open letters of credit for payment of the bills that might be presented by the seller

Exhibit B-1 reads·

"We hereby authorise and request you and/or your Agents and/or Representatives at New York to open a confirmed and irrevocable bank credit in favour of Messrs British Mercantile Company, Limited etc , and to make payment or payments thereunder on our behalf against documents purporting to be invoices, shipping specifications Bills of Lading and Policies and/or Certificates of Insurance covering Marine and War Risks We agree that this credit is subject to U S A. regulations and practice "

Exhibit B-2 is also a similar letter of crdit Clause 3 of Exhibit 28 reads

" Clean ' On Board ' Bills of Lading in complete sets of at least two signed copies to be made out to the order of the Eastern Bank Limited, or to order blank endorsed and marked by the shipping company ' Freight paid ' "

Exhibit B-29 also contains similar recitals It will be seen that though the words " clean on board " bills of lading are not found in Exhibits B-1 and B-2, but in the directions given to the Marine Midland Trust Company, New York, the said words are clearly found The following relevant recitals are found in a sample of the bills of lading

" Received in apparent good order and condition from British Mercantile Company, Limited, "*City of Lucknow*" to be transported by the good vessel, "*City of Lucknow*" to sail from the Port of New York for the East Indies .

Total 21 packages, said to weigh 9,920 lbs said to be marked and numbered as below (weight, gauge, measurement, contents, conditions, quality and value unknown, statements of same herein being made solely on shippers declaration and this bill of lading not to be deemed any evidence thereof) to be delivered as provided hereunder (liability as carrier to end without notice) in like good order and condition at Madras or so near thereto as vessel may safely get unto order of the Mercantile Bank of India, Limited, or to his or their Assigns .. . ".

The bill of lading gives the number of packages as 21 drums, and under the column " description of goods " it states " Polystyrene Powder " The Mate's receipt given to the seller on the arrival of the goods at the wharf for being carried by S S. "*City of Lucknow*" describes them as being packed in reused drums The seller gave an indemnity bond to the shipowners and the material part of it reads.

" We shall be obliged by your granting us Clean Bills of Lading for the undermentioned goods, Mate's receipt being claused Reused Drums—

and in consideration of your so doing we undertake to pay on demand all freight and/or General and particular Average and/or charges there may be thereon, to indemnify you and each of you against all claims and/or demands which may be made against you or any of you in respect of the undermentioned goods and to hold you harmless from any and all consequences that may arise by your granting such clean Bill of Lading and acting thereon including losses, damages, costs or any other expenses which you or any of you may sustain or incur by reason of the premises or in any way relating thereto "

After obtaining the said indemnity bond, the shipowners issued the bill of lading wherein instead of " reused drums ", only " drums " was mentioned It will be seen from the said documents that according to the indents the seller had to pack the goods in new fibre drums, that the Bank opened letters of credit for payment against bills of lading, that the Marine Midland Trust Company of New York, the agent of the Eastern Bank, Limited, Madras, opened letters of credit whereunder payments could be made only against clean bills of lading, that in the Mate's receipt given to the seller on the arrival of the goods at the wharf for being carried by S S " *City of Lucknow*" the drums were described as reused drum and that there-

after, after giving indemnity against any loss to the shipowners, in the bill of lading the drums were not described as reused drums but only as drums The learned City Civil Judge on the said documents gave the following finding:

> "Thus if the bills of lading were unclean certainly the banks would not have paid the money to the shippers. In fact it was for the very purpose of enabling the shippers to obtain monies from the banks that they wanted clean bills of lading and were prepared to give letters of indemnity to the shipping company. With such description in the bills of lading it is extremely doubtful whether even the under-writers would have insured the goods as required under the letters of credit. If the shippers had not produced either clean bills of lading or Certificates of Insurance as required under the letters of credit then certainly the shippers could not have realised the money from the bank. Thus the second defendants have certainly helped the shippers in this matter by suppressing the real condition of the goods from the bills of lading."

The High Court, agreeing with that finding, held

> " the shipowner with the knowledge that the bills of lading would be negotiated, gave at the request of the seller clean bills of lading, while as a matter of fact only unclean bills of lading should have been given "

The question is whether on the said facts and the findings given by the Courts below the purchaser could maintain an action for deceit against the shipowners

" Deceit is a false statement of a fact made by a person knowingly or recklessly with the intent that it shall be acted upon by another who does act upon it and thereby suffers damage": *see* " A Text Book of the Law of Tort " by Winfield, 5th Edn , at p 379 In order to make the shipowners liable for deceit, the first ingredient to be satisfied is that they knowingly issued a clean bill of lading, when it should not have been given with intent that on that basis payment would be made to the holder of the bill under the letters of credit In order to come to a correct conclusion whether the ingredients of the definition of " deceit " have been satisfied in the present case, it is necessary to know the exact scope of the following three terms: " letters of credit", " bill of lading " and " clean bill of lading". The said three expressions are evolved in the law merchant to facilitate international trade The origin and importance of letters of credit in the international commerce has been stated by Denning, L J , in *Pavia & Co , A P A.* v. *Thurmann Neilsen*[1], as follows :

> " The sale of goods across the world is now usually arranged by means of confirmed credits. The buyer requests his banker to open a credit in favour of the seller and in pursuance of that request the banker, or his foreign agent, issues a confirmed credit in favour of the seller. This credit is a promise by the banker to pay money to the seller in return for the shipping documents. Then the seller, when he presents the documents, gets paid the contract price The conditions of the credit must be strictly fulfilled, otherwise the seller would not be entitled to draw on it."

But when issuing banker has no branch in the relevant country where the beneficiary operates, the services of an intermediary banker may be requisitioned. The intermediary banker may be asked to advise the beneficiary of the credit or may be asked to add his confirmatory undertaking to it In the latter event the beneficiary has the promise of both the bankers

As letters of credit are issued or opened on conditions on which the request is made, the banker can only negotiate the shipping documents if the conditions are strictly complied with If, for instance, the mandate of the buyer is that the banker shall pay on a clean bill of lading, the banker can only honour a clean bill and not an unclean one When a purchaser specifically directs the banker to pay against a clean bill of lading, the condition for payment is an obvious one. But, when a credit is for bills of lading without any qualification, in normal circumstances it means clean bills of lading: see *British Imex Industries Ltd* v *Midland Bank Ltd.*[2].

A clean bill of lading is defined in Halsbury's Laws of England, 3rd Edition. Volume 2 at page 218, as "one which does not contain any reservation as to the apparent good order and condition of the goods or the packing". Carver in his book " British Shipping Laws, " Volume 2, Part I, in Paragraph 82, explains the expression " good order and condition " thus .

1. L.R. (1952) 2 Q.B. 84 at 88. 2. L.R. (1958) 1 Q.B. 542 at 551.

"The general statement in the bill of lading that the goods have been shipped ' in good order and condition ' amounts (if it is unqualified) to an admission by the shipowner that, so far as he and his agents had the opportunity of judging, the goods were so shipped If there is no clause or notation in the bill of lading modifying or qualifying the statement that the goods were ' shipped in good order and condition ' the bill is known as a clean bill of lading "

Decisions have held that the " condition " refers to external and apparent condition, and quality, to something which is usually not apparent at all events to an unskilled person · See *Compania Naviera Vasconzada* v *Churchill & Sim*[1]. The words like " quality and measure unknown " found in *Compania Naviera Vasconzada* v *Churchill & Sim*[1], " weight, contents and value unknown" in *The Peter der Grosse*[2], " weight, quality, condition and measure unknown " in *The Tromp*[3] were held to be not qualifying words In *The Restitution Steamship Co , Ltd* v *Sir John Pirie & Co.*[4], it was held " if you insert in the margin of a bill of lading weights, quantities, or anything that is not contained in the bill of lading itself, that is not a clean bill of lading" If such words found a place in the body of a bill of lading, they would not have the effect of making the bill an unclean one we do not see how their mention in the margin would make a difference. But we need not express our final opinion thereon, as in the present case the words are found in the body of the bill itself.

But it is said that the omission of the adjective " new " qualifying the word "drums" or indeed the addition of the adjective " old " to qualify the same would not necessarily make the bill anytheless a clean bill, if old drums were suitable vehicles for conveying the articles supplied therein The newness or the oldness of the container, the argument proceeded, was not decisive of its suitability, for in the main it depended upon its condition and contents This argument as a proposition of law appears to be sound In *The Tromp*[3], potatoes, to the knowledge of the defendants' Master who signed the bill of lading, were shipped in wet bags and in a damaged condition. The Court held that as in the bill of lading, the potatoes were described as shipped in good order and condition which represented the external condition of the bags, the defendants were estopped from denying that the bags were dry when shipped. But it would be noticed that the packing in that case was defective and that was the main cause for the rotting of the potatoes and, therefore, the bill of lading was not a clean one ' In *Silver* v *Ocean Steamship Co , Ltd*[5] damage was caused to frozen eggs as the can wherein they were packed were gashed, perforated or punctured and the eggs were insufficiently packed. So the Court held that having given a clean bill of lading the shipowner was estopped from proving that the cans were not in apparent good order and condition. In *Brown Jenkinson & Co Ltd* v. *Percy Dalton (London) Ltd*[6] orange juice was shipped in barrels Some of the barrels were old and frail and some were leaking. Yet the shipowners gave a clean bill of lading They were estopped from denying that the barrels were in apparent good order and condition.

These decisions establish that good order and condition of packages depends upon the suitability of the packages for the particular goods or articles packed therein and other relevant circumstances of each case

What is the real scope and legal effect of the statement in the bill of lading that the goods were shipped in good order and condition? We have already noticed that a bill of lading with such a statement, which does not contain any further reservation or qualification, is known as a clean bill of lading. The said words are affirmation of a fact. It is an admission creating an estoppel as between the shipowners and an endorsee, who on the faith of that admission has become endorsee for value of the bill of lading. The shipowners are estopped from denying that the goods and the packages were not in good order and condition The estoppel applies only where the bad condition is discernible on a reasonable examination of the containers, having regard to their contents Any qualification of the said affirmation must only refer to the external and apparent condition of the containers.

1 L.R. (1906) 1 K. B. 237
2. L R (1876) 1 P. 414.
3. L.R. (1921) P 337
4. (1889) 5 T L R 641.
5 L R (1930) 1 K B 416
6 L.R (1957) 2 Q B 621

see *The Skarp*[1], *Silver* v *Ocean Steamship Co , Ltd ,*[2], *Compania Naviera Vasconzada* v. *Churchill & Sim*[3], and *The Tromp*[4] It is not necessary to consider the said decisions in detail as the principle is well settled.

Now let us look, at the relevant facts of the present case. It was one of the terms of the contract between the seller and the buyer that the goods should be packed in new fibre drums The standard of good order and condition of the packages was agreed upon by the parties to the contract. The shipowners knew that condition as the Mate's receipt disclosed the same. If the drums had been mentioned as old in the bill of lading, the said bill would not have been a clean bill. Though the apparent condition of the drums was old, the shipowners made an assertion that they were not old drums, *i e* , they gave a clean bill. This representation was obviously intended, in collusion with the seller, to enable him to operate upon the credit with the Bank. This collusion is also apparent from the indemnity bond they took from the seller to guard themselves against the consequences of the said representation. All the elements of deceit are present

The decision in *Brown Jenkinson & Co , Ltd* v *Percy Dalton (London) Ltd*[5] is apposite There, the defendants had a quantity of orange juice which they wished to ship to Hamburg The plaintiffs, as agents of the owners of the vessel on which the orange juice was to be shipped, informed the defendants that the barrels containing the orange juice were old and frail and that some of them were leaking and that a claused bill of lading should be granted The defendants required a clean bill of lading, and the shipowners, at the defendants' request and on a promise that the defendants would give to them an indemnity, signed bills of lading stating that the barrels were " shipped in apparent good order and condition " The defendants, pursuant to their promise, entered into an indemnity whereby they undertook unconditionally to indemnity the Master and the owners of the vessel against all losses which might arise from the issue of clean bills of lading in respect of the goods. The barrels when delivered at Hamburg, were leaking and the shipowners had to make good the loss. The plaintiffs sued the defendants under the indemnity, the benefit of which had been assigned to them The defendants refused to pay, alleging that the contract of indemnity was illegal, because it had as its object the making by the shipowners of a fraudulent misrepresentation. The Court held that the shipowners by making in the bill of lading a representation of fact that they knew to be false with intent that it should be acted upon were committing the tort of deceit, and that the defendants promise to indemnity the shipowners against loss resulting from the making of that representation was accordingly unenforceable The only difference on facts between that case and the present one is that in that case the barrels were not only old and frail but also some of them were leaking But there, as here, the shipowners made a representation of fact which they knew to be false with intent that it should be acted upon If so, it follows that the High Court was right in holding that the appellant was liable in damages for the loss incurred by the respondent

Learned Counsel for the appellant sought to raise three further points, namely, (*i*) the shipowners were not bound by the representation made by the ship's Mate ; (*ii*) the bill of lading was governed by the American Law and not by common law ; and (*iii*) the plaintiff buyer, having obtained a decree against the seller in the American Court, could not maintain the present suit for damages

The first point was not raised till now and, therefore, we cannot permit the learned Counsel to raise it for the first time before us

The second point, namely, "what is the American law ?" is a question of fact. We have not got sufficient material on the record to know what is the American law on the subject We cannot, therefore, permit the appellant to raise this point either

1 L R (1935) P D 134
2 L R (1930) 1 K B. 416.
3 L R (1906) 1 K B 237.
4 L R (1921) P 337
5 L.R. (1957) 2 Q B 621.

The third point is also one not pressed in the Courts below and, therefore, does not call for our decision

In the result, the appeal fails and is dismissed with costs

K G S ——— *Appeal dismissed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction)

PRESENT —A K SARKAR, *Chief Justice*, J R MUDHOLKAR AND R. S. BACHAWAT, JJ

Gopalakrishna Pillai and others .. *Appellants**

*v.*

Meenakshi Ayal and others . *Respondents*

*Civil Procedure Code (V of 1908), Order 20, rule 12—Applicability and scope—Plaint valued for possession and past profits—Court-fee paid thereon—Future profits not prayed for—Discretion of Court to order inquiry into future profits*

*Will—Proof of— Attesting witness—Not proving signature of the other attestor thereto—Effect*

The High Court of Madras in Letters Patent Appeal found that (i) the will set up in defence by the defendants-appellants herein was not genuine, (ii) the plaintiffs were the next reversioners of the last full owner and decreed the suit for possession and past profits, it further directed the trial Court to ascertain future profits under Order 20, rule 12, Civil Procedure Code Hence this appeal to the Supreme Court on the grounds (i) that the first plaintiff had a son who would be the reversionary heir, (ii) the will was genuine, and (iii) no inquiry under Order 20, rule 12, could be directed in the absence of a prayer for that relief

*Held.* In as muchas the attesting witness, examined at the trial, did not depose that he saw the other attestor (not called as a witness) sign the deed it could not be held that the will was proved , the question of genuineness of the will need not be gone into under the circumstances

Assuming the first plaintiff had a son it is not possible to say that he was born during the life of the intermediate limited estate-holder *C* and if so, he was alive at *C*'s death , further no issue on this question being framed at the trial and in view of the trial having proceeded on the footing that the Plaintiffs were the reversionary heirs the High Court was right in holding that it was not open to the defendants to contend otherwise

Having regard to (i) the valuation of the plaint claim for possession and past profits and the payment of Court-fee thereon, (ii) the averment in the plaint that the plaintiffs are entitled to call for accounts of mesne profits since the death of *C*, and (iii) the prayer for such other relief as the Court may deem fit and proper to grant, the suit is one 'for the recovery of possession of immovable property and for mesne profits' The provisions of Order 21, rule 12 are therefore attracted.

The Court may, under the said rule 12, pass a decree for the possession of the property and directing an enquiry as to rent or mesne profits prior to the institution of the suit and as to subsequent profits though the relief of future mesne profits in not prayed for in the plaint

*Fakharuddin Mahomed Ahsan* v *Official Trustee, Bengal,* (1889) L R 8 I A 197 I L R 8 Cal. 178 (P C.), followed

Appeal by Special Leave from the Judgment and Decree, dated the 24th February, 1961, of the Madras High Court in L P A No 126 of 1957

*N C Chatterjee*, Senior Advocate (*R Ganapathy Iyer*, Advocate, with him), for Appellants

*T. V. R. Tatachari*, Advocate, for Respondents Nos 1 and 3 to 7.

The Judgment of the Court was delivered by

*Bachawat, J*—The following pedigree shows the relationship of Sivasami Odayar and the members of his family

* C A No 79 of 1964. 31st March, 1966.

Chinnayal

| | | |
|---|---|---|
| Sivasami Odayar married Neelayadakshi | Meenakshi Ayal (Plff No 1) | Kamakshi Ayal (Plff No 2) |

Sivasami died issueless in 1927. By his will dated 14th September, 1927, he bequeathed items 1 to 4 and one half of items 12 and 13 of the suit properties to his wife, Neelayadakshi absolutely and items 5 to 11 and one half of items 12 and 13 to his mother, Chinnayal absolutely He also appointed Chinnayal as the trustee of items 14 to 18 for the benefit of the Pillayar temple Neelayadakshi died in 1931. It is common case that on her death Chinnayal inherited her properties as a limited heir Defendants 6 and 7 claimed that their father purchased item 4 from one Muthukumaraswami, agent of Chinnayal, under a sale deed, dated 5th June, 1937 On 28th August, 1940, Chinnayal executed a deed of gift in favour of Muthukumaraswami giving him items 1, 3 and 8 and portions of items 5 and 13. On 4th September, 1940, Chinnayal is said to have executed a will bequeathing to Muthukumaraswami the remaining properties belonging to her absolutely and inherited by her as a limited heir from Neelayadakshi and also items 14 to 18 and her trusteeship right in respect of those items Chinnayal died on 15th September, 1940 It is common case that the plaintiffs are her heirs Soon after her death, Muthukumaraswami conveyed to one Venugopala all the properties acquired by him under the aforesaid gift deed and will. Venugopala died in 1943 leaving defendants 1 to 5 as his heirs In or about August, 1952, Meenakshi and Kamakshi instituted a suit in the Court of the Subordinate Judge, Cuddalore for possession of the suit properties alleging that they were entitled to the properties left by Chinnayal and Neelayadakshi and denying the factum and validity of the gift deed, dated 28th August, 1940, the will dated 4th September, 1940 and the alleged sale in favour of the father of defendants 6 and 7 The defendants contested the suit

The Courts below held that (1) Chinnayal had no power to dispose of any of the properties which she had inherited from Neelayadakshi as a limited heir, (2) Chinnayal duly executed the gift deed and by that deed she lawfully disposed of item 8 and portions of items 5 and 13, and (3) there was no sale of item 4 to the father of defendants 6 and 7. These findings are no longer challenged The Subordinate Judge held that the plaintiffs failed to prove that they were the reversioners of Neelayadakshi, or were entitled to inherit her properties on the death of Chinnayal, and that the will dated 4th September, 1940 was forged and its execution and attestation were not proved The plaintiffs and the defendants preferred separate appeals from this decree to the Madras High Court. Ramaswami, J , held that the will was genuine and was duly executed and attested but it was inoperative with regard to items 14 to 18 and the trusteeship rights in those items He also held that the question whether the plaintiffs were the next reversioners of Neelayadakshi should be tried afresh by the trial Court Thereafter, Kamakshi died and her legal representatives were substituted on the record Meenakshi and the legal representatives of Kamakshi filed an appeal under clause 15 of the Letters Patent of the High Court, and the appellants filed cross-objections A Division Bench of the Madras High Court held that the will was not genuine and its execution and attestation were not proved It also held that on the materials on the record the plaintiffs must be held to be the next reversioners of Neelayadakshi On this finding, the Division Bench passed a decree in favour of the appellants before them for the recovery of possession of items 1 to 4, 3 cents in item 5, items 6, 7 and 9 to 13 and items 14 to 18, declared that they were entitled to mesne profits for three years prior to the suit and to future mesne profits in respect of the aforesaid properties, directed the trial Court to make an enquiry into the mesne profits under Order 20, rule 12 of the Code of Civil Procedure and ordered that in respect of the rest of the suit properties the suit be dismissed Some of the defendants now appeal to this Court by Special Leave

Counsel for the appellants challenged before us the correctness of the findings of the Division Bench of the High Court with regard to (1) the factum and execution

of the will and (2) the plaintiffs' claim to be the next reversioners of Neelayadakshi He also contended that the High Court had no power to pass a decree for mesne profits accrued after the institution of the suit.

The appellants' case is that the will of Chinnayal, dated 4th September, 1940, was attested by Balasubramania and Samiyappa The appellants rely solely on the testimony of Samiyappa for proof of the execution and attestation of the will Samiyappa was not present when Chinnayal is said to have put her thumb-impression on the will Samiyappa said that when he was passing along the street, Balasubramania and Muthukumaraswami called him He went inside Chinnayal's house, Muthukumaraswami gave the will to him and after he read it aloud, Chinnayal acknowledged that she had affixed her thumb-impression on the will. He then put his signature on the will and Balasubramania completed it after he left In his examination-in-chief, he said nothing about the attestation of the will by Balasubramania In cross-examination, he said that after he signed, Balasubramania wrote certain words on the will and put his signature On further cross-examination, he added that Balasubramania was saying and writing something on the will, but he did not actually see Balasubramania writing or signing. We are satisfied that Samiyappa did not see Balasubramania putting his signature on the will The High Court rightly held that the appellants failed to prove the signature of Balasubramania or the attestation of the will by him On this ground alone we must hold that the will was not proved. We do not think it necessary to consider the further question whether the will was genuine

The plaintiffs claimed that on Chinnayal's death the properties acquired by Neelayadakshi under the will of Sivasami devolved upon them as the next reversioners of Neelayadakshi. Relying on a statement of P.W. 2, Sethurama Nainar, that Meenakshi had two daughters and a son, the appellants contend that the son of Meenakshi was the reversionary heir of Neelayadakshi. Assuming that Meenakshi had a son, it is not possible to say that he was born before the death of Chinnayal, and, if so, he was alive at the time of her death In the absence of any son of Meenakshi at the time of Chinnayal's death, admittedly the plaintiffs would be the next reversioners of Neelayadakshi No issue was raised on this question, and the trial proceeded on the footing that the plaintiffs were the next reversioners of Neelayadakshi. The trial Court refused leave to the appellants to file an additional statement raising an issue on this point In the circumstances, the Division Bench of the Madras High Court rightly held that it was not open to the appellants to contend that the plaintiffs were not the reversionary heirs of Neelayadakshi, and were not entitled to succeed to her estate on the death of Chinnayal.

In the plaint, there was no specific prayer for a decree for mesne profits subsequent to the institution of the suit Counsel for the appellants argued that in the absence of such a specific prayer, the High Court had no jurisdiction to pass a decree for such mesne profits We are unable to accept this contention Order 20, rule 12 of the Code of Civil Procedure provides that "where a suit is for the recovery of possession of immovable property and for rent or mesne profits" the Court may pass a decree for the possession of the property and directing an enquiry as to the rent or mesne profits for a period prior to the institution of the suit and as to the subsequent mesne profits The question is whether the provisions of Order 20, rule 12 apply to the present suit We find that the plaintiffs distinctly pleaded in paragraph 9 of the plaint that they were entitled to call upon the defendants to account for mesne profits since the death of Chinnayal in respect of the suit properties For the purposes of jurisdiction and Court-fees, they valued their claim for possession and mesne profits for three years prior to the date of the suit and paid Court-fee thereon In the prayer portion of the plaint, they claimed recovery of possession, an account of mesne profits for three years prior to the date of the suit, costs and such other relief as may deem fit and proper to the Court in the circumstances of the case On a reading of the plaint, we are satisfied that the suit was for recovery of possession of immovable property and for mesne profits. The provisions of Order 20, rule 12 were, therefore, attracted to the suit and the Court had power to pass a decree in the suit for both past and future mesne profits

Order 20, rule 12 enables the Court to pass a decree for both past and future mesne profits but there are important distinctions in the procedure for the enforcement of the two claims With regard to past mesne profits, a plaintiff has an existing cause of action on the date of the institution of the suit In view of Order 7, rules 1 and 2 and Order 7, rule 7 of the Code of Civil Procedure and section 7(1) of the Court Fees Act, the plaintiff must plead this cause of action, specifically claim a decree for the past mesne profits, value the claim approximately and pay Court-fees thereon. With regard to future mesne profits, the plaintiff has no cause of action on the date of the institution of the suit, and it is not possible for him to plead this cause of action or to value it or to pay Court-fees thereon at the time of the institution of the suit. Moreover, he can obtain relief in respect of this future cause of action only in a suit to which the provisions of Order 20, rule 12 apply But in a suit to which the provisions of Order 20, rule 12 apply, the Court has a discretionary power to pass a decree directing an enquiry into the future mesne profits, and the Court may grant this general relief, though it is not specifically asked for in the plaint, see *Basavayya* v. *Guruvayya*[1] In *Fakharuddin Mahomad Ahsan* v *Official Trustee of Bengal*[2], Sir R P. Collier observed ·

> " The plaint has been already read in the first case, and their Lordships are of opinion that it is at all events open to the construction that the plaintiff intended to claim wasilat up to the time of delivery of possession, although, for the purpose of valuation only, so much was valued as was then due , but be that as it may, they are of opinion that, under section 196 of Act VIII of 1859, it was in the power of the Court if it thought fit, to make a decree which should give the plaintiff wasilat up to the date of obtaining possession "

Section 196 of Act VIII of 1859 empowered the Court in a suit for land or other property paying rent to pass a decree for mesne profits from the date of the suit until the date of delivery of possession to the decree-holder The observations of the Privy Council suggest that in a suit to which section 196 of Act VIII of 1859 applied, the Court had jurisdiction to pass a decree for mesne profits though there was no specific claim in the plaint for future mesne profits The Court has the like power to pass a decree directing an enquiry into future mesne profits in a suit to which the provisions of Order 20, rule 12 of the Code of Civil Procedure, 1908, apply

In support of his contention that the Court has no jurisdiction to pass a decree for future mesne profits in the absence of a specific prayer for the same, Counsel for the appellants relied upon the following passage in *Mohd Yamin and others* v. *Vakil Ahmed and others*[3]

> " It was however pointed out by Shri S P Sinha that the High Court erred in awarding to the plaintiffs mesne profits even though there was no demand for the same in the plaint The learned Solicitor-General appearing for the plaintiffs conceded that there was no demand for mesne profits as such but urged that the claim for mesne profits would be included within the expression ' awarding possession and occupation of the property aforesaid together with all the rights appertaining thereto' We are afraid that the claim for mesne profits cannot be included within this expression and the High Court was in error in awarding to the plaintiffs mesne profits though they had not been claimed in the plaint The provision in regard to the mense profits will therefore have to be deleted from the decree "

In our opinion, this passage does not support Counsel's contention This Court made those observations in a case where the plaint claimed only declaration of title and recovery of possession of immovable properties and made no demand or claim for either past or future mesne profits or rent It may be that in these circumstances, the suit was not one " for the recovery of possession of immovable property and for rent or mesne profits," and the Court could not pass a decree for future mesne profits under Order 20, rule 12 of the Code of Civil Procedure But where, as in this case, the suit is for the recovery of possession of immovable property and for past mesne profits, the Court has ample power to pass a decree directing an enquiry as to future mesne profits, though there is no specific prayer for the same in the plaint In the aforesaid case, this Court did not lay down a contrary proposition, and this was pointed out by Subba Rao, C J , in *Atchamma* v *Rami Reddy*[4]

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1 (1951) 2 M L J 176 I L R (1952) Mad 173 at 177 A I R 1951 Mad 938 (F B)
2 (1881) I L R. 8 Cal. 178, 189 , L R 8 I A 197
3 (1952) S C J 539 (1953) 1 M L J. 6: (1952) S C R 1133, 1144 A I R 1952 S C 358.
4 (1957) 2 An W R 474 I L R (1957) Andh Pra 52, 56 A I R 1958 A P 517

We are, therefore, satisfied that in this case the High Court had discretionary power to pass the decree for future mesne profits It is not contended that the High Court exercised its discretion improperly or erroneously We see no reason to interfere with the decree passed by the High Court

In the result, the appeal is dismissed with costs

K G.S. ——— *Appeal dismissed*

## THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction )

PRESENT —M HIDAYATULLAH, V RAMASWAMI AND J M SHELAT, JJ

Kuppa Goundan and another . *Appellants**

*v.*

M S P Rajesh .. *Respondent.*

*Criminal Procedure Code (V of 1898), sections 476 and 479-A—Criminal trial before a criminal Court—Order of acquittal passed—Witness giving false evidence—Not detected by the Court—Subsequent application under section 476—Court finding witness gave false evidence—Written complaint by the Criminal Court to the District Magistrate—Proper—Section 479-A not a bar*

The question of law in this appeal is ' what is the true meaning and scope of section 476 of Criminal Procedure Code in the context of section 479-A (1) and (6) (added by Act XXVI of 1955) with regard to a prosecution authorised by a Court in respect of an offence of perjury committed before it in the course of the trial.

*Held* If a Court is of opinion that it is expedient in the interests of justice that an enquiry should be made into any offence referred to in section 195 (1) (*b*) or (*c*) which appears to have been committed in or in relation to a proceeding in that Court such Court may after preliminary enquiry, if any, as it thinks necessary, record a finding to that effect and make a complaint thereof in writing and forward the same to a Magistrate of the First Class having jurisdiction. That is the procedure prescribed by section 476 of the Code.

For the application of section 479-A of the Criminal Procedure Code there is a necessary condition, namely, that the Court before it delivers its judgment or at any rate at the time of delivering the judgment must form the opinion that a witness is giving false evidence, if the Court could not form any opinion about the falsity of the evidence of the witness before it, then certainly the Court cannot at the time of delivering judgment record any finding about the same

The bar of clause (6) of section 479-A will not apply to a case where perjury is detected not merely with reference to the evidence adduced at the trial but with reference to the evidence adduced in some other proceeding not then brought before the Court or because there is some other material subsequently produced after the conclusion of the trial and delivery of judgment (in the instant case a proceeding under section 476, Criminal Procedure Code)—which renders the prosecution necessary in the interests of justice Applying the above principle to the instant case the prosecution of the petitioners by forwarding the complaint to the District Magistrate (Judicial) by the Magistrate's Court under section 476 after the conclusion of the trial is legally valid and not affected by section 479-A It is only in the petition under section 476 filed after the judgment in the criminal case was delivered the trial Court came to be satisfied that the witness was giving false evidence

*Kasi Thevar* v. *Chinniah Konar*, I L R (1959) Mad 990 (1959) M L.J (Crl ) 953 (1959) 2 M L J 524 and In re *Gnanamuthu*, A I.R. 1964 Mad 446, approved

Appeal by Special Leave from the Judgment and Order, dated the 9th December, 1965, of the Madras High Court in Criminal Revision Case No 1261 of 1964 and Criminal Revision Petition No 1235 of 1964

*R. Thiagarajan*, Advocate, for Appellants.

*Purshottam Trikumdas*, Senior Advocate (*T V R. Tatachari*, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

*Ramaswami, J.*—The 2nd petitioner Kuppuswami lodged a complaint with Yercaud Police on 12th October, 1963, alleging that the respondent, M S P.

* Cr A. No 69 of 1966 5th May, 1966.

Rajesh and other persons had formed an unlawful assembly and committed offences of house trespass, mischief and causing hurt at 10 P.M. on 11th October, 1963. The complaint was the subject-matter of investigation by the police who did not present a charge-sheet against respondent, M. S. P. Rajesh but filed a charge-sheet against 4 other persons under sections 323, 325 and 448, Indian Penal Code in C.C. No. 3097 of 1963 in the Court of Sub-Magistrate 3, Salem. The case was tried by the Sub-Magistrate who ultimately acquitted all the accused by his judgment, dated 13th December, 1963. In the course of evidence at that trial the 1st petitioner was examined as P.W. 1 and 2nd petitioner as P.W. 2 and it is alleged by the respondent that the petitioner gave false evidence to the effect that the respondent was also among the trespassers and assailants and that he was armed with a gun which another accused took from him. After the conclusion of the trial the respondent filed a petition in the Court of the Magistrate under section 476 (1), Criminal Procedure Code alleging that on 11th October, 1963, he along with certain other Directors had attended a meeting of the Board of Directors of Chembra Peak Estate, Ltd., from 4-30 P.M. to 5-15 P.M. at Bangalore and that he was not at Yercaud on 11th October, 1963, and prayed for the prosecution of the petitioners for giving false evidence under section 193, Indian Penal Code. The respondent produced a copy of the Draft Minutes of the Board meeting and also cited certain witnesses in support of his case. After considering the matter, the Sub-Magistrate of Salem held that he was satisfied that the respondent could not have been present at the alleged occurrence on 11th October, 1963, at Yercaud and that P.Ws. 1 and 2 deliberately committed perjury and implicated Mr. Rajesh as among the assailants. The Sub-Magistrate thought that in the interest of justice the petitioners should be prosecuted under section 193, Indian Penal Code and accordingly filed a complaint against the petitioners under section 193, Indian Penal Code in the Court of District Magistrate (Judicial), Salem. The petitioners contended that the complaint was not maintainable in law because the trying Magistrate had not followed the procedure under section 479-A, Criminal Procedure Code and it was therefore not open to the Magistrate to take recourse to the provisions of section 476, Criminal Procedure Code. By his order, dated 10th February, 1964, the District Magistrate discharged the petitioners holding that the complaint was not sustainable in view of the decision of this Court in *Shabir Husain Bholu* v. *State of Maharashtra*[1]. Thereupon the respondent filed Criminal R.C. No. 1261 of 1964 in the Madras High Court against the order of the District Magistrate (Judicial), Salem. By his judgment, dated 9th December, 1965, Anantanarayanan, J., set aside the order of the District Magistrate (Judicial) and directed that the case should be taken up by the District Magistrate and the trial proceeded with in accordance with law.

This appeal is brought, by Special Leave, from the order of the Madras High Court, dated 9th December, 1965, in Crl. R.C. No. 1261 of 1964.

The question of law arising in this case is—what is the true meaning and scope of section 476, Criminal Procedure Code in the context of section 479-A (1) and (6), Criminal Procedure Code with regard to a prosecution authorised by a Court in respect of an offence of perjury committed before it in the course of the trial?

Chapter XXXV of the Code of Criminal Procedure prescribes the procedure to be followed for prosecution of offenders in case of certain offences affecting the administration of justice, section 476 sets out the procedure for prosecution of offenders for offences enumerated in section 195 (1) (*b*) and (*c*) of the Code of Criminal Procedure. If a Civil, Revenue or Criminal Court is of opinion, that it is expedient in the interests of justice that an enquiry should be made into any offence referred to in section 195 (1) (*b*) or (*c*) which appears to have been committed in or in relation to a proceeding in that Court, such Court may, after such preliminary inquiry, if any, as it thinks necessary, record a finding to that effect and make a complaint thereof in writing and forward the same to a Magistrate of the First Class having jurisdiction. Section 476-A authorises a superior Court to make

1. (1964) 1 S.C.J. 609 (1964) M.L.J. (Crl.) S.C. 816.
338 : (1963) 1 S.C.R. (Supp.) 501 A.I.R. 1963

a complaint where a subordinate Court has omitted to do so in respect of offences and in the circumstances mentioned in section 476 (1). Section 476-B provides for a right of appeal against the order making or refusing to make a complaint. Sections 478 and 479 deal with the procedure which may be followed in certain grave cases Section 479-A which was added by the Code of Criminal Procedure (Amendment) Act XXVI of 1955 by the first sub-section (in so far as it is material) provides as follows .

"479-A. (1) Notwithstanding anything contained in sections 476 to 479 inclusive, when any Civil, Revenue or Criminal Court is of opinion that any person appearing before it as a witness has intentionally given false evidence in any stage of the judicial proceeding or has intentionally fabricated false evidence for the purpose of being used in any stage of the judicial proceeding, and that, for the eradication of the evils of perjury and fabrication of false evidence and in the interests of justice, it is expedient that such witness should be prosecuted for the offence which appears to have been committed by him, the Court shall, at the time of the delivery of the judgment or final order disposing of such proceeding, record a finding to that effect stating its reasons therefor and may, if it so thinks fit after giving the witness an opportunity of being heard, make a complaint thereof in writing signed, by the presiding officer of the Court setting forth the evidence which, in the opinion of the Court, is false or fabricated and forward the same to a Magistrate of the First Class having jurisdiction, and may .. . ...."

Sub-section (6) of this section enacts as follows :

"(6) No proceedings shall be taken under sections 476 to 479 inclusive for the prosecution of a person for giving or fabricating false evidence, if in respect of such a person proceedings may be taken under this section."

The scheme of section 479-A is to enact a special procedure for the more expeditious and effective manner of dealing with certain cases of perjury and fabrication of false evidence by witnesses in the course of judicial proceedings. There is, however, a necessary condition for the application of section 479-A, Criminal Procedure Code The condition is that the Court before it delivers its judgment or at any rate at the time of delivering the judgment must form an opinion that a particular witness or witnesses, is, or, are giving false evidence; if the Court could not form any opinion about the falsity of the evidence of the witness appearing before it, then certainly the Court cannot at the time of delivering its judgment, record any finding about the same. It is manifest that a Court can come to a conclusion that a witness is false only when there are materials placed before it to justify that opinion If no materials are placed before the Court to enable the Court to form an opinion that a witness is giving false evidence, then certainly it could not form that opinion In the present case, the respondent produced material before the trial Court on 23rd December, 1963, after the conclusion of the trial that the petitioners had given false evidence in the case and the respondent produced the necessary documents along with an application for proceeding against the petitioners under section 476, Criminal Procedure Code Till those documents were produced there was no opportunity or occasion for the Magistrate to form an opinion about the falsity of the evidence adduced by the petitioners. It is, therefore, manifest that at the time when the judgment was delivered the Magistrate had no material before him to form an opinion that the petitioners had given false evidence. It is only after the respondent had made his application on 23rd December, 1963 and brought the necessary material to the notice of the Court that the falsity of the evidence of the petitioners became apparent and the Magistrate was in a position to form an opinion about the falsity of the evidence given by the petitioners. It is, therefore, clear that section 479-A will not be applicable on the facts of this case, and if the provisions of section 479-A will not apply on the facts of this case it follows that the bar contemplated by clause (6) of that section will not be applicable The reason is that clause (6) can be invoked only in cases in which section 479-A (1) will be applicable The crucial words of clause (6) are "if in respect of such a person proceedings may be taken under this section". It is clear that the bar under section 479-A (6) refers not to the legal character of the offence *per se* but to the possibility of action under section 479-A upon the facts and circumstances of the particular case If, for instance, material is made available to the Court after the judgment had been pronounced, rendering it clearly beyond doubt that a person had committed perjury during the trial and that material was

simply unavailable to the Court before or at the time of judgment, it is very difficult to see how the Court could have acted under section 479-A, Criminal Procedure Code at all. It cannot be supposed that the Legislature contemplated that a case of perjury, however, gross should go unpunished in such circumstances It appears to us that the true interpretation of the language of clause (6) of section 479-A is that it does not operate as a bar to the prosecution for perjury in a case of this description. Take, for instance, the trial of '*A*' for the murder of '*B*' in the Sessions Court where '*C*,' '*D*' and '*E*' gave evidence that they actually saw '*A*' committing the murder of '*B*' Suppose at the conclusion of the trial and after delivery of judgment by the Sessions Court '*B*' is found alive and there is uncontestable evidence to show that '*A*' was falsely charged for the murder of '*B*' Is it to be contemplated that in such a case there is no remedy available to the Court to prosecute *C*, *D* and *E* for perjury under the provisions of section 476, Criminal Procedure Code, though action cannot be taken, in the circumstances of the case, under section 479-A, Criminal Procedure Code? In our opinion, such a startling consequence was not contemplated by Parliament and the bar of clause (6) of section 479-A was intended only to apply to cases of perjury and fabrication of false evidence in which the trying Magistrate could have acted under section 479-A (1) In other words, the bar of clause (6) will not apply to a case where perjury is detected not merely with reference to the evidence adduced at the trial but with reference to the evidence adduced in some other distinct proceeding, not then brought before the Court or because there is some other material subsequently produced after the conclusion of the trial and delivery of judgment which renders the prosecution for perjury essential in the interests of justice Applying the principle in the present case we are of opinion that the prosecution of the petitioners under the provisions of section 476, Criminal Procedure Code by the Magistrate after the conclusion of the trial is legally valid and is not affected by the bar of clause (6) of section 479-A, Criminal Procedure Code.

On behalf of the appellants Mr. Thiagarajan referred to the decision of this Court in *Shabir Hussein Bholu* v. *State of Maharashtra*[1] But the principle of that decision does not afford any assistance to the appellants in this case It appears that the appellant in that case appeared as a witness in a jury trial for murder. Before the Court he gave a statement contradictory to the one he had given before the committing Court. After the conclusion of the trial and delivery of judgment the Sessions Judge passed a separate order for prosecution of the appellant for intentionally giving false evidence under section 193, Indian Penal Code It was held by this Court that the provisions of section 479-A had not been complied with and no cognizance could be taken of the offence Two conditions were laid down for the exercise of the powers under section 479-A, (i) the Court must form an opinion that the person has committed one of the two categories of offences referred to in section 479-A, and (ii) the Court must come to the conclusion that for the eradication of the evils of perjury, etc , and in the interests of justice it is expedient that the person be prosecuted This opinion and conclusion must be arrived at at the time of the delivery of the judgment or final order in the trial, the Court cannot later on resort to section 476 and make a complaint against the witnesses The provisions of section 479-A were held applicable to the case and the fact that the trial was with the aid of a jury did not preclude the Sessions Judge from recording the findings required by section 479-A While considering whether action should be taken under section 479-A it was open to the Sessions Judge to say whether the evidence tendered at the trial was true or false It is manifest that the material in that case was produced before the Sessions Court for coming to the conclusion that the appellant had committed perjury and so the procedure contemplated in section 479-A (1) was applicable and since the Sessions Judge did not proceed under that section, though he could have done so, the bar contemplated by clause (6) of section 479-A operated and no action could have been taken under section 476, Criminal Procedure Code The ratio of that decision is not applicable to the present

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1. (1964) 1 S.C.J. 609 (1964) M.L.J. (Crl.) 338 : (1963) 1 S.C.R. (Supp.) 501 : A.I.R. 1963 S.C 816.

case because the material facts are different. It is necessary to add that in *Shabir Hussein Bholu* v *State of Maharashtra*[1], this Court observed that if the Judge is unable to come to a conclusion that the statement made at the trial is false then provisions of section 479-A (1) would not be applicable. At page 512 of the Report it was observed by this Court as follows .

"But, for considering the applicability of section 479-A (1) what has to be borne in mind is that in a jury trial it is possible for the judge to come to a conclusion that the statement made at the trial is false. If he comes to that conclusion then, as rightly observed in *Badullah's case*[2] he has no option but to proceed under section 479-A (1), Criminal Procedure Code The question then is whether he could act under this provision if he is unable to form an opinion one way or the other as to whether the evidence tendered at the trial is false or the evidence before the committing Magistrate is false What would be the position in such a case ? If the proceedings before the committing Magistrate must be held to be entirely separate proceedings then we agree with the Allahabad High Court that section 479-A (1) would not apply."

There is divergence of opinion among the various High Courts on the question of law presented for determination in this case. In *Jai Bir Singh* v *Mulkhan Singh and another*[3], it was held by Sahai, J , that the bar of section 479-A (6) applies to all cases of perjury, *viz.*, (1) those where the perjury or the fabrication of false evidence has been detected by the Court when the judgment is pronounced, and (2) cases where the perjury or fabrication of false evidence does not come to light till after the judgment has been pronounced and it was not open to the Court to proceed under section 476, Criminal Procedure Code, for prosecution in the latter class of cases. The same view has been taken by the Punjab High Court in *Parshotam Lal, L Vir Bhan* v. *Madan Lal Bashambar Das*[4], and by the Rajasthan High Court in *Amolak* v. *State*[5] A contrary view has been expressed by the Madras High Court in *C P. Kasi Thevar* v. *Chinnaiah Konar*[6], and In re *Gnanamuthu*[7].

For the reasons already expressed we are of opinion that the decision of the Madras High Court in *C P. Kasi Thevar* v. *Chinnaiah Konar*[6], and In re *Gnanamuthu*[7], represents the correct law on the point.

For these reasons we hold that there is no merit in this appeal which is accordingly dismissed.

K.G S. *Appeal dismissed.*

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THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction )

PRESENT :—P. B GAJENDRAGADKAR, *Chief Justice*, K. N. WANCHOO, M. HIDAYATULLAH, J C SHAH AND S. M SIKRI, JJ.

Aluru Kondayya and others .. *Appellants**

*v.*

Singaraju Rama Rao and others .. *Respondents.*

*Madras Estates Land Act (I of* 1908), *section* 3 (2) (*d*), Explanation *added by Act II of* 1945—*Inam grant —Whether an ' estate '—Grant, if expressed to be of a named village—Burden on person claiming to bring the grant within the exception—Presumption of an ' estate ' arises on such proof—Non inclusion of lands already granted or reserved for communal purposes—Not conditions for raising of such presumption—Presumption, rebuttable by other facts, but not by facts in the* non-obstante *clause—Presmption before and after the Amendment Act XVIII of* 1936

*Held,* on the evidence the grant was not proved to be of a named village

The presumption under *Explanation* (1) to section 3 (2) (*d*) of the Madras Estates Land Act arises when it is proved that a grant as an inam is expressed to be of a named village, the area which forms the subject-matter of the grant shall be deemed to be an estate, even if it appears that in the grant are not included certain lands in the village which have before the grant of the named village been granted on service or other tenure or have been reserved for communal purposes The *non-obstante* clause in the *Explanation* does not prescribe the condition for the raising of the presumption.

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1 (1964) S C J 609 . (1964) M L J. (Cr ) 338 . (1963) 1 S C R (Supp ) 501 . A I R 1963 S C 816
2 A I R 1961 All. 397.
3. A.I R 1958 All 364.
4. A I R 1959 Punj 145.
5. A I R 1961 Raj 220.
6 I L R. (1959) Mad. 390 : (1959) 2 M L J 534 . (1959) M L J (Crl.) 953 : A I R 1960 Mad. 77.
7. A I.R. 1964 Mad. 446.

*C.As. Nos. 341 to 343 of 1961. 20th September, 1965.

The burden of proving that the grant is expressed to be of a named village must lie upon the party who claims to bring the grant within the exception, but once it is so proved the presumption under the *Explanation* arises

The presumption is not a conclusive presumption, it is a presumption of law and is rebuttable It may be rebutted by proof of other facts, but not the facts mentioned in the *non-obstante* clause

Under the Act before it was amended in 1936, a grant of a village could be deemed a grant of an estate where only the melvaram was granted to the inamdar and not where both the kudivaram and melwaram were granted By enacting section 23 by the Amendment Act of 1936 the Legislature intended to declare that in determining whether under a grant of an inam village both varams were granted or only the melwaram was granted, it shall be presumed, until the contrary was shown, that such a village or part thereof was an estate, that is, only the melwaram was granted

Undoubtedly in cases arising under the amended Act, the conditions on which the presumption will arise are prescribed under the *Explanation* (1) to section 3 (2) (*d*)

In cases which arose before the Amending Act of 1936 the presumption under section 23 of the Act as added by the Amendment Act XVIII of 1936 applied and in cases which arose since the amendment of 1936 the presumption prescribed by *Explanation* (1) applied by the virtue of the provisions of Act II of 1945

The Supreme Court, in *District Board Tanjore* v *M K Noor Mohammad,* A I R 1953 S C 446 (1952) 2 M L J 586 did not lay down that the burden of proving that the grant was of an estate, lay upon the tenants

Appeals from the Judgment and Decree dated the 2nd September, 1955, of the Andhra Pradesh High Court in Appeals Suits Nos 342 of 1949, 789 of 1950 and 551 of 1951 respectively †

*A V V Nair* and *P Rama Reddy,* Advocates, for Appellants

*A V Viswanatha Sastri,* Senior Advocate, (*Alladi Kuppuswamy* and *M S. Narasimhan,* Advocates, with him), for Respondents Nos 1 and 2 (In C A No. 341 of 1961), Respondetns Nos 1 to 3 (In C A No 342 of 1961) and Respondents Nos 1 to 4 and 6 (In C A No 343 of 1961)

The Judgment of the Court was delivered by

*Shah, J* —In these appeals a common question—whether a *shrotriem* grant of lands known as "Challayapalem *shrotriem*" formed an estate within the meaning of section 3 (2) (*d*) of the Madras Estates Land Act, 1908—arises The Court of first instance on a review of the evidence was of the opinion that the grant was of the whole Chellayapalem village within the meaning of section 3 (2) (*d*) of the Madras Estates Land Act, 1908, in force at the relevant time, and that the tenants held rights of occupancy in the lands held by them The High Court of Madras disagreed with that view and held that on the evidence it was not proved that the original grant was of a "whole village" or even of a "named village" within the meaning of section 3 (2) (*d*) of the Madras Estates Land Act, 1908, and the *First Explanation* thereto, and that the onus to prove that the grant was of a whole or of a named village being upon the tenants in occupation of the lands in dispute, the claim of the *shrotriemdars* must succeed With certificates granted by the High Court, these three appeals have been preferred

Suit No 42 of 1942 was filed by certain tenants of lands in the village Challayapalem, District Nellore, for a declaration that they hold occupancy rights in lands in their occupation and for an injunction restraining the *shrotriemdars* of the village from "interfering with their possession" The tenants claimed that "they and their ancestors" were in possession and enjoyment of the lands for many years and had been paying rent to the *shrotriemdars,* and were dealing with the lands as owners, that all transactions in the Challayapalem *shrotriem* were being made on the footing that the village was an "estate" under the Madras Estates Land Act, 1908, and that in any event the tenant held permanent rights of occupancy in the lands acquired in virtue of the provisions of the Madras Estates Land (Amendment) Act, 1936. This suit was later numbered 37 of 1947.

† (1956) An W R. 86.

The *shrotriemdars* filed Suit No 2 of 1946 against fifteen named defendants for a declaration that the tenants in occupation of the lands in the village did not hold permanent occupancy rights Later, permission under Order 1, rule 8 Code of Civil Procedure to sue the named defendants as representating of all the tenants in the lands of the *shrotriem* grant was obtained In this suit the *shrotriemdars* did not claim any relief for possession ; they merely sought to reserve liberty to institute separate proceedings in that behalf and claimed that they were entitled in enforcement of notices served upon ten out of the named defendants to call upon them to deliver possession of lands occupied by them

There was one more Suit No 93 of 1947, which raised a dispute as to the right of occupancy in a small area of land admeasuring 1-90 acres The plaintiff in the suit claimed that he had acquired the right of occupancy by purchase from the original tenant of the land The fourth defendant in the suit who was the principal contesting party claimed that he was a grantee of occupancy rights from the *shrotriemdars*

The three suits were tried together. The tenants claimed in the principal Suit No 2 of 1946 occupancy rights in the lands held by them, on three grounds.

(1) that the tenants of agricultural lands were, by immemorial custom of the locality in the Nellore District, occupancy tenants ,

(2) that the tenants had acquired by prescription or by the doctrine of lost grant the rights of permanent occupancy ; and

(3) that the grant was of an estate within the meaning of section 3 (2) (*d*) of the Madras Estates Land Act, 1908, and the tenants of the lands in the estate were by virtue of section 6 of the Act permanent occupancy tenants

The trial Court, relying upon the statement in Boswell's Manual of the Nellore District, that the "tenants * * * of Chellayapalem like their brothers in other villages of this District had right to occupy the land from generation to generation on payment of rent prescr bed by custom," held that the tenants' plea on the first head must be sustained The High Court declined to raise such a presumption in favour of the tenants of the District including tenants of the village Challayapalem, and correctness of that view was not challenged in this Court On the second ground, the trial Court held on the evidence that the tenants' rights "were independent of prescription," and that they had not raised any plea of acquisition of rights of occupancy by contract, express or implied The High Court observed that on the evidence no "foundation is laid for invoking the presumption of lost grant to give a leagl origin, or lawful title to long continued possession of the land by a particular tenant or tenants," and that the plea of acquisition of the right of occupancy based on prescription was not made out. This plea was also not reiterated before us, and the appeals were supported only on the last ground

The grant was, it appears, made by a Carnatic Nawab which is recognised on all hands to be a *shrotriem* grant There is, however, on the record no evidence to prove the date of the grant, the names of the grantor and the grantee, the extent and terms of the grant, the purpose and nature of the grant, and whether the grant was of *kudiwaram* as well as of *melwaram* or of *melwaram* alone The original deed of grant has not been produced and there is no other direct evidence of the terms of the grant from which the term of the grant may be gathered The trial Court held that the later documents, such as the statement in the Inam Enquiry, the Inam Fair Register and other documents, conduct of the *shrotriemdars* and the tenants, and recognition accorded to the rights of the tenants viewed in the light of probabilities justified an inference that the grant was of the whole village, but according to the High Court the evidence on the record was inconclusive and the case must be decided against the tenants because the onus to prove that the grant was of an estate lay upon the tenants, and that the tenants had failed to discharge that onus

The problem must be approached in the distinct branches—whether the evidence justifies an inference that the grant was of a whole village, and if there be

no such evidence whether section 3 (2) (*d*) *Explanation* (1) of the Madras Estates Land Act gives rise to a presumption in favour of the *shrotriemdars* or the tenants. Between the years, 1640 to 1688 the territory which now forms the District of Nellore was under the sovereignty of the Sultan of Golkonda. In 1688 this territory along with Golkonda passed under the Moghal dominion After the war between the East India Company and Sultan Hyder Ali, it was arranged between the Government of Madras and the Nawab of Carnatic that the latter should bear the cost of the military defence of the Carnatic region The Nawab agreed to assign the revenues of the Carnatic region for a period of five years to the East India Company, and in pursuance of this arrangement, the East India Company took over the administration of the Carnatic region in 1790 On 18th August, 1790 the Board of Revenue, Madras issued instructions to the Collectors of Revenue appointed by the East India Company, relating to the administration of the Districts Dighton who was the first Collector of the Nellore District under the new dispensation found on enquiry that some villages in the District had been alienated on *shrotriem* tenure. He proceeded to investigate the title of the grantees and issued a number of *sanads*. During the course of his management Dighton addressed on 13th November, 1790 to the "Chellayapalem *Shrotriemdar* Mutharaju Ramachandrayya *Sthala Karnai Varu*" the following communication :

"You shall pay as per instalments *varahas* 283 (two hundred and eighty three) being the *beriz* in respect of your *shrotriem* known as Chellayapalem village in Gandavaram Paraganas, as entered in the circar shrotriem jabitha, into the Nellore Treasury, obtain receipt and happily enjoy the produce realised from that village, you shall enjoy happily by giving shares to the *kapus* as per *mamool*"

Administration of the territory by the East India Company came to an end on 31st August, 1792 On 31st July, 1802 the East India Company, assumed sovereignty over the District of Nellore and one Travers was appointed Collector in September, 1801. Travers recognised 207 *shrotriem* villages without disturbing the arrangements which were then in existence, dispensed with the duties of *sthalakarnams* and collected quit rent on their inams It appears that the *shrotriem* of Chellayapalem was continued under the arrangement of the year 1790 which we have set out.

Soon after the East India Company took over the administration of what later came to be known as the Presidency of Madras, Regulation XXXI of 1802 setting up machinery for the better ascertainment of titles of persons holding or claiming to hold lands exempt from payment of revenue to Government under grants and for fixing assessment on such lands was promulgated A register of Inams in Government Taluks was prepared and in Column 14 of the Inam Register the Inams registered pursuant to the Regulation were set out. In the village Chellayapalem are found mentioned in that Register—three Inams—the Chellayapalem *shrotriem* (which is in dispute in the present case), and two other personal inams each of an area of 0·93 cents Apart from the preparation of this Inam Register, nothing substantial was done under the Regulation till 1860 About the actings of the *shrotriemdars* and the tenants between 1802 and 1860 there is very little evidence. There is no evidence as to when the five minor inams, including those two mentioned in the Inam Register, were created, who paid the revenue, whether tenants were shifted from lands in their occupation, or lands originally not occupied were brought under cultivation In 1860 the Inam Commission commenced an inquiry in the Nellore District Exhibit B-195 is a record of the statement made by the *shrotriemdars* Muthuraju Subbarao and Muthuraju Subbarammayya of Chellayapalem. In Column 6 it is recorded that the grant was made during the time of the Nawabs for maintenance so as to be enjoyed from son to grandson and so on in succession, and in Column 7 details of the lands are set out. Out of the total area of the land 21 *Gorrus* 12/16 are recorded as *poramboke*, 5 *Gorrus* and 1¾ Visas as minor inams, and 126 3¾ *visas* as cultivated lands—dry, wet and garden The boundaries and particulars of the inam lands are shown as if the inam grant was of the whole village, the description of the boundaries being of lands of other villages to the East, South, West and on the North of lands of military barracks Income of the *shrotriem* is fixed at Rs 1,449-5-5 per annum and the total *jodi* at Rs. 1,225-12-2, leaving a balance of Rs 223-9-3 to the *shrotriemdars*. This statement is described as written

and filed by Muthuraju Subbarao and Subbarammayya *shrotriemdars* of Chellayapalem, and that it was confirmed by the Village Officers Pursuant to the enquiry made by the Inam Commissioner entries were posted in the Inam Fair Register. In Exhibit A-1 which is described as " an extract from the Register of Inams in the village of Chellayapalem *shrotriem* in the taluk of Nellore " in Column 21 it was recited that the *shrotriem*

" being more than 50 years old could be confirmed In the account of Fasli 1221 the income of the *shrotriemdars* for ten years previous to that Fasli is given It is shown in the margin that the *shrotriem* is rented from Fasli 1263 to Fasli 1287, that is for a period of 25 years for the sum of Rs 244 above the *jodi* The cost of the repair to be borne half by the tenant and half by the *shrotriemdar* ** Almost the whole land is now under cultivation and there is scarcely any room for further improvement I propose to give a deduction of Rs 20 on account of the cost of repair which the *shrotriemdar* will have to pay and adopt the remainder as the value of the *shrotriem* "

In Columns 10 and 11 it is recorded that the inam was hereditary, but by whom it was granted it was not known It is common ground that Exhibit A-1 did not include the area of five minor inams for which separate entries Exhibits A-2 to A-6 were posted The total area of the village as then estimated exceeded 466 acres and Exhibit A-1 related to 453-06 acres, the balance being in respect of minor inams Pursuant to the entries in the Inam Fair Register, confirmatory title deeds were issued Exhibits A-2 and A-3 relate to *devadayam* grants the extent covered by Exhibit A-2 is 5-68 acres, and by Exhibit A-3 is 2-83 acres In Columns 11 and 12 headed " By whom granted and written instrument in support of the claim " it is recorded that " the name of the grantor and the written instruments in respect of the claim not known " Three other entries in the Inam Fair Register were Exhibits A-4, A-5 and A-6 Exhibit A-4 is in respect of land 3-12 acres, Exhibit A-5 is in respect of 0-93 cents and Exhibit A-6 also is in respect of 0-93 cents Here also it was recorded that the " grantor's name and the date of the grant are not known".

The next public document to which reference may be made is the " Descriptive Memoir of Chellayapalem *shrotriem* village in the Kovur Taluk of the Nellore District "—Exhibit A-7 It recites that the boundary of the village had remained unchanged by settlement: the area prior to settlement was (omitting fractions) 469 acres, and by the settlement it was found to be 767 acres, showing an increase of 298 acres, but " nothing had been merged in this village by the settlement". According to the settlement accounts of land, the total cultivable area was 682 acres, minor inams 18 acres and poramboke 67 acres Under the head "minor inams included in the village " were Personal Inams 5-08 acres, Religious Inams 8-64 acres, village officers 2-87 acres and village artisans 1-80 acres. Under Exhibit A-7 the whole village was described as the Chellayapalem *shrotriem.* Apparently the village was identified with the *shrotriem.*

These are all the extracts from public records which have a bearing on the principal question in dispute.

The plaintiffs in Suit No 2 of 1946 are purchasers under two deeds Exhibits A-101 and A-102 respectively dated 14th January, 1889, and 7th August, 1889, from the previous holders They are strangers to the family of the original grantees, and it is not surprising that they are not in possession of the deed of grant, and the earlier record relating to the management of the village.

Exhibit B-1 the letter addressed by Dighton to the *shrotriemdar* may at first blush suggest that the village was accepted and confirmed as one of the *shrotriem* villages in the Gandavaram Paragana But Exhibit B-1 was not of the nature of a *sanad* it did not contain a reference to the terms of the grant, the date of the grant, the names of the grantor and grantee, and was based on information by a " *Jabitha* (list) relating to Circar's *shrotriems*". In Boswell's Manual it is recited that Dighton had investigated the title of the inamdars in the District and had granted *sanads*, but Exhibit B-1 did not purport to be a confirmatory *sanad* or a fresh grant, or a deed embodying the result of any investigation regarding the title of the Muthurajus to the village Exhibit B-1 undoubtedly refers to Muthuraju Ramchandrayya as

"Chellayapalem *Shrotriemdar*" and fixes the revenue at 283 *pagodas* in respect of "your *shrotriem* known as Challayapalem village". But Dighton was a Collector of Revenue appointed by the East India Company which was in 1790 not invested with *de jure* sovereignty over the region There is also no record of any enquiry made by Dighton in respect of the Challayapalem *shrotriem* The object of the letter Exhibit B-1 is apparently two fold · to fix the revenue, and to ensure that the tenants were not subjected to unlawful exactions For the latter purpose it was directed that the *shrotriemdar* was to enjoy the produce from the village by giving shares to the *kapus* (tenants) as per *mamool* Exhibit B-1 does not refer to any minor inams, and treats the Challayapalem village as the *shrotriem* of Muthurajus.

The statement of Muthuraju Subbarao and Subbarammayya—Exhibit B-195—suggests that the original grant was in favour of Muthuraju Sithanna—their ancestor The statements in Column 6 that the grant is from the Nawab whose name is not mentioned, and in Column 7 about the details of the entire extent of the village, do not furnish any evidence as to the character and extent of the original grant It is true that the boundaries of the lands are described as if the grant was of a whole village, and nothing is mentioned about the origin of the minor inams. Exhibit A-1—the Inam Fair Register Extract—is in respect of 453-03 acres whereas the total area of the village as then measured exceeded 466 acres The area of 13 acres was undoubtedly held by minor inamdars in respect of which entries Exhibits A-2 to A-6 were posted in the Inam Fair Register Those entries are of no assistance in tracing the source of the minor inams In each of those extracts under the head "By whom granted and written instrument in support of the claim" it is recited that the names of the grantor and the written instrument in support of the claim "are not known". *Sanads* in respect of the minor inams were issued because the inams were found to be more than fifty years old Inams in respect of which entries Exhibits A-5 and A-6 are posted are found mentioned in the Inam Register prepared under Regulation XXXI of 1802, but not the inams in respect of which Exhibits A-2, A-3 and A-4 are issued. It also appears that in the Inam accounts, the inam relating to Exhibit A-2 appeared for the first time in Fasli 1211, the inam relating to Exhibits A-5 and A-6 in Fasli 1216, the inam relating to Exhibit A-3 in Fasli 1250 and the inam relating to Exhibit A-4 in Fasli 1260 But the accounts maintained under Regulation XXXI of 1802 were apparently not maintained either regularly or in respect of all the inams In the absence of reliable evidence from entries in these rough accounts, no inference that the minor inams were granted by the *shrotriemdars* could be made The name of the grantor is not to be found in Exhibits A-2 to A-6 Exhibit A-7 proves the existence of minor inams, but has no bearing on the question whether the whole village Challayapalem was granted in inam

In Exhibits A-48, A-49, A-104, A-105 and A-103 the predecessor-in-interest of the present inamdar had described the village as "Challayapalem *Shrotriem*"; in Exhibits A-102, B-44, B-45, B-12 to B-19, B-20 to B-43, the present inamdar's grandfather was a party and therein also the inamdars were described as "*shrotriemdars* of Challayapalem". There are documents Exhibits B-2, B-3, B-4, B-5, B-6, B-9, B-112 and B-116 and other documents in which the village is described as "Chellavapalem *Shrotriem*" But these recitals have no evidentiary value in support of the case that the whole village was granted

The statements in Exhibit B-195 related only to a part of the village and that the income realised by the inamdar was Rs. 1,449-5-5 per year, out of which the revenue payable to the Government was Rs 1,225-12-2 and the balance enjoyed as inam was only Rs 223-9-3 Exhibit A-1—Extract from the Inam Fair Register—does not lead to the inference that the area of the entire village was granted The recommendation made by the Deputy Collector was confined to the *shrotriem* The *shrotriem* was confirmed merely because it was more than fifty years old, and what was confirmed was not the area of the entire village, but the *shrotriem* grant admeasuring 453-06 acres out of a total area of 466 acres,

Evidence on the record about the actings of the *shrotriemdars* and the tenants for the period 1790 to 1862 is vague and inconclusive It appears from the Inam Register that for a period of 25 years the *shrotriem* was under an *Ijara* The Inam Fair Register recites that garden lands were irrigated from the private wells of the *shrotriemdars* From the accounts for Fasli 1216 it appears that more than a hundred acres were then lying uncultivated, but for some time before 1862 the whole village was under cultivation

On the other hand there is the evidence that the tenants' successors were recognised in place of their predecessors, family partitions were approved, and the *shrotriemdars* received their proportionate shares from the divided sharers, and the tenants were not disturbed in their possession Chellayapalem has at all material times been included in the list of villages maintained in the Collector's office It was within the boundaries which are not shown to have been altered A village in the Madras region is a geographical area of arable and waste lands, and contains the establishment of a *karnam*, village munsiff and watchmen, and Chellayapalem has at all material times been recognised as a village, and has been administered accordingly Minor inams were always regarded as part of the village, and popularly and even in the public records the village was identified with the *shrotriem*. The *shrotriemdars* have failed to produce their books of account relating to their management. It is however admitted by them that they were collecting *jodi* from the holders of minor inams and paying it into the public exchequer. It was explained by S. Rama Rao, P W 1 that he "collected the cess" as a registered proprietor and paid it over into the treasury, because a demand was made upon him by the Revenue authorities for the whole amount of land cess due.

But long possession, fixity of rent, and assertion of title in formal deeds may not necessarily justify an inference of permanent occupancy rights. Again the mere fact that the village was treated as one unit for the purpose of revenue administration does not justify any positive inference and the fact that five separate *sanads* were issued in respect of the minor inams without any evidence to prove the date and the terms of the grant leaves the matter in doubt Some of these circumstances may *prima facie* support the inamdars and the others the tenants, but on a careful review of all those circumstances, we are unable to disagree with the opinion of the High Court that the grant was not proved to be of a whole village.

The second branch of the argument must then be considered. The High Court expressed its conclusion on this branch of the case as follows :

> "Whether a tenant raises the plea that the lands were in an estate and therefore ryoti and the civil Court has no jurisdiction, or the tenant relies upon the statute in answer to a suit by the landlord either for an injunction, * * * * or even for a declaration as in the present case, the burden of proof would undoubtedly be on the tenant to establish the case which he put forward either to exclude the jurisdiction or to negative the right of the plaintiff The burden will be on him to show that the grant was either a grant of a whole village or a grant of a named village "

In so enunciating the law, the High Court relied upon the judgment of this Court in *District Board, Tanjore* v *M. K Noor Mohamed Rowther*[1], and held that in law the burden of proving that a particular grant was a grant of an estate lay upon the tenants in all cases, and the tenants having failed to discharge that burden their claim must fail.

In considering this argument, it is necessary to make a brief review of the history of land tenures and the provisions of the Madras Estates Land Act, 1908, as they were amended from time to time. After the assumption of sovereignty in 1801, the East India Company promulgated the Permanent Settlement Regulation XXV of 1802, which dealt with the tenure of Zamindars in their estates. This Regulation was passed on 13th July, 1802, and by section 4 thereof inams were exempted from its scope. On the same date, another Regulation XXXI of 1802 was enacted. This Regulation dealt with inams and provided for making rules for the better

1. (1952) 2 M.L J. 586 : A.I.R. 1953 S.C. 446.

ascertainment of titles of persons holding or claiming to hold, lands exempted from the payment of revenue to Government under grants not being "Badshahi" or Royal and for fixing an assessment on such lands. By section 15 it was enacted that a register of inams shall be kept in each *zillah* of the lands held exempt from the payment of revenue, and that the register should specify the denomination of each grant or *sanad*, the names of the original grantors or grantees, and the names of the present possessors, with other particulars It appears that nothing effective was done to investigate the titles of the claimants to inams till 1859, when the question of examining their title was taken up by the Inam Commission The Inam Commission made inquiries and issued confirmatory *sanads* We have already referred to Title Deed No 1762 issued in respect of the grant in favour of the *shrotriemdars*.

The traditional rights of occupants of land in the southern region were recorded by the Board of Revenue as early as in 1818 in its proceeding dated 5th January, 1818, that:

"The universally distinguishing character, as well as the chief privilege of this class of people, is their exclusive right to the hereditary possession and usufruct of the soil, so long as they render a certain portion of the produce of the land, in kind or money, as public revenue, and whether rendered in service, in money, or in kind, and whether paid to rajahs, jageerdars, Zamindars, polygars, motahdars, shrotriemdars, inamdars or Government Officers, such as tahsildars, amildars, aumeens, or tanadars, the payments which have always been made by the ryot are universally termed and considered the dues of the Government"

The Legislature with a view to define the relations between landlords and tenants in inam villages promulgated Madras Act I of 1908 The material part of section 6 (1) as amended by Madras Act VIII of 1934 and XVIII of 1936 provided:

"Subject to the provisions of this Act, every ryot now in possession or who shall hereafter be admitted by a landholder to possession of ryoti land situated in the estate of such landholder shall have a permanent right of occupancy in his holding

*Explanation* (1) —For the purposes of this sub-section, the expression 'every ryot now in possession' shall include every person who, having held land as a ryot continues in possession of such land at the commencement of this Act.

*Explanation* (2) — * * *

*Explanation* (3) — * * * "

Section 3, sub-section (2) defined the expression "estate" within the meaning of the Act and in so far as it is material for this case, it provided as originally enacted:

"In this Act, unless there is something repugnant in the subject or context—

'Estate' means—

(*a*) any permanently-settled estate or temporarily settled zamindari;

(*b*) any portion of such permanently settled estate or temporarily settled zamindari which is separately registered in the office of the Collector,

(*c*) any unsettled palaiyam or jagir,

(*d*) any village of which the land revenue alone has been granted in inam to a person not owning the kudivaram thereof, provided that the grant has been made, confirmed, or recognised by the British Government, or any separated part of such village,

(*e*) any portion consisting of one or more villages of any of the estates specified above in clauses (*a*), (*b*) and (*c*) which is held on a permanent under-tenure"

"*Kudivaram*" is a Tamil word, which signifies the cultivator's share in the produce of land as distinguished from the landlord's share received by him as rent, which is called "*melvaram*" "*Kudivaram*" has acquired a secondary meaning, it means the cultivator's interest in the land, and "*melvaram*" the landlord's interest in the land. The definition of "estate" in clause (*d*) gave rise to considerable litigation which called for determination of two questions: (1) whether there was a grant of the whole village so as to make the area granted an estate, and (2) whether the landlord to whom the land was granted owned the "*kudivaram*". In cases which came before the Courts it appeared that apart from the grant which was claimed to be a grant of an estate, there were in each village other grants, religious, service and

personal, and evidence about the commencement of these minor grants and the terms on which they were granted was not forthcoming.

In *G Narayanaswami Nayudu* v *N Subramanyam*[1], in a suit filed by the receiver of the Nidadaole estate for possession of certain lands the tenant claimed that he had acquired occupancy rights under section 6 of the Madras Estates Land Act I of 1908. There were in the village minor inams of *three* classes *archaka* service inams, village service inams, and *dharandaya* inams, and there was no evidence whether the grant to the plaintiff's estate of the village was made first, or whether the minor inams were granted first. It was contended on behalf of the plaintiff estate that inasmuch as there were minor inams in the village, the *Venkatapuram agraharam* could not be said to be " a village of which the land revenue had been granted as inam within the meaning of section 3 (2) (*d*) of the Act ". The Court rejected that contention and observed :

" The definition in sub-section (2), clause (*d*) was obviously intended to exclude from the definition of ' Estate ' what are known as minor inams, namely, particular extents of land in a particular village as contrasted with the grant of the whole village by its boundaries. The latter are known as ' whole inam villages '. The existence of ' minor inams ' in whole inam villages is very common and if these inam villages do not come within the definition of ' Estate ' almost all the agraharam, shrotriem and mokhasa villages will be excluded This certainly cannot have been the intention of the Legislature These minor inams are generally granted for service to be rendered to the village or to the owner and that seems to be the nature of the minor inams in this case."

The Court therefore held that section 3 (2) (*d*) of the Madras Estates Land Act excludes from the definition of ' estate ' minor inams, and a grant which purports to be a grant of a whole inam village is an estate within the meaning of clause (*d*) of section 3 (2) even though it may be found that there are lands held by grantees under minor inams The Legislature in 1936 substituted for clause (*d*) of section 3 (2) the following clause by the Madras Estates Land (Third Amendment) Act, (XVIII of 1936) :

" (*d*) any inam village of which the grant has been made, confirmed or recognized by the British Government, notwithstanding that subsequent to the grant, the village has been partitioned among the grantees or the successors in title of the grantee or grantees."

Then came the judgment of the Madras High Court in *Tulabandu Ademma* v. *Sreemath Satyadhyana Thirtha Swamivaru*[2]. In that case the original grant was lost. In Column 6 of the statement prepared by the Inam Commissioner in that case, it was recorded that :

"The former Zamindars granted the land, comprised within the '*Chekunama*' for the *math*. There is no *sanad* as it was destroyed by fire There was no entry under the heading 'particulars of the inam land mentioned in the *sanad*', but under the head '*Gudicut*' (the total area of the village) was the entry 158 23 acres, from which were deducted 25 10 acres described as private lands, and 5·4 acres 'inams of other persons' leaving 128 6 acres as the area covered by the grant "

In Column 10 it was stated that there was no ' *Chekunama* '. The Court held that the grant being of less than the whole village, the tenant could not rely on section 6 of the Act. In that case the boundaries of the *agraharam* as described in Column 10 in the Inam Register were admittedly the boundaries of the whole village, but in the view of the Court Column 10 had to be read in conjunction with the other columns There was no evidence whether the other inams were granted before the grant in favour of the *Devasthana* or after This case apparently marked a departure from the rule which was enunciated earlier by the Madras High Court in *G. Narayanaswami Nayudu's case*[1].

The Legislature immediately reacted against this view and by Madras Estates Land (Amendment)-Act II of 1945, added the following *Explanation* to clause (*d*) of section 3 (2) *Explanation* (1) read as follows .

" Where a grant as an inam is expressed to be of a named village, the area which forms the subject-matter of the grant shall be deemed to be an estate notwithstanding that it did not include certain lands in the village of that name which have already been granted on service or other tenure or been reserved for communal purposes "

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1. (1915) I L R. 39 Mad 683 : 29 M L J. 478.

2 (1943) 2 M.L J 289 : A I.R 1943 Mad. 187.

This *Explanation* was made operative retrospectively from the date on which Madras Act XVIII of 1936 was brought into force The *Explanation* was apparently intended by legislative process to restore the interpretation which the Madras High Court had given to the expression "whole village" in *G Narayanaswami's case*[1]. But the Legislature had used somewhat involved phraseology in enacting the conditions which gave rise to the presumption. If a minor inam was proved to be granted prior to the date of the grant, by virtue of *Explanation* (1) the grant expressed to be of a named village had to be regarded as a grant of an estate. If it was proved that the grantee after receiving the whole village created minor inams, the grant was of the whole village and therefore grant of an estate But where evidence about the creation of the major and minor inams was not forthcoming, the question had to be decided on the presumption that the subject-matter of the grant shall be deemed to be an estate, notwithstanding that it did not include lands granted on service or other tenures or lands reserved for communal purposes On the true effect of the *Explanation* there was a sharp conflict of judicial opinion resulting in three distinct views In one set of cases it was ruled that the burden of proving that a tenant is entitled to permanent rights of occupancy in his holding by virtue of section 6 of the Madras Estates Land Act always lies upon the tenant, and it is for the tenant to establish affirmatively that the minor inams in the village were granted before the date of the grant of the named village, and if he failed to do so his claim is liable to fail : see *Rama Rao* v *Linga Reddi*[2], and *Ramadhan Chettiar* v *State of Madras*[3]. In another set of cases it was held that where relief is claimed before the Court on the plea that a grant of land was of an estate, or that it was not of an estate, and the evidence is inconclusive, the person who has approached the Court for relief must fail : see the judgment of Krishna Rao, J., in *Nelluru Sundararama Reddy* v *State of Andhra Pradesh*[4]. *Varada Bhavanarayana Rao* v. *State of Andhra Pradesh*[5], and *Addanki Thiruvenkata Thata Desikacharyulu Ayyavarlamgaru* v. *The State of Andhra Pradesh and others*[6]. In the third set of cases it was held that the *Explanation* raises a presumption where a grant is expressed to be of a named village, that the area which formed the subject-matter of the grant shall be deemed to be an estate, and it is for the party contending that the grant in question falls outside the definition of section 3 (2) (*d*) of the Act to prove that case either by showing that the minor inams not comprised in the grant were created contemporaneously with or subsequent to the grant of the village by the original grantor : see *Janakiramaraju* v. *Appalaswami*[7], *Nelluru Sundararama Reddy* v. *State of Andhra Pradesh*[4], *State of Andhra Pradesh* v. *Korukonda Bhattam Appalacharyulu*[8] and *Sri Varadarajaswamivari Temple* v. *Sri Krishnappa Govinda and others*[9].

In expressing the first view the *non-obstante* clause in the *Explanation* was read as prescribing the conditions on proof of which the statutory presumption arises. The *Explanation* was apparently read as implying that the conditions for the raising of the presumption were that the grant as an inam is expressed to be of a named village, and that the other lands not included in the grant were granted before that date on service, or other tenure or reserved for communal purposes If this be the true effect, the *Explanation* had little practical utility The intention of the Legislature apparently was to declare rights of occupancy of tenants in inam villages, and it would be difficult to believe that the Legislature intended to place upon the tenants onus of proof which in normal cases would be well-nigh impossible to discharge. A large majority of the inams are ancient and the records bearing on the commencement, extent and nature of the grant would invariably be in the possession of the inamdars. To expect that tenants who are generally illiterate, and who

1 (1915) I L R 39 Mad 683 29 M L J 478

2. (1955) An W R 89 A I.R 1957 A.P 632

3 (1957) 1 M L J 348 A I R 1958 Mad 104.

4. (1958) 2 An W R 536 I L R (1959) A P. 337 (F B)

5. (1964) 2 S C J 523 (1964) 2 An W R (S.C.) 117 (1964) 2 M L J (S C) 117 (1964) 2 S.C.R. 501 : A I R. 1963 S.C 1715.

6 C A No 619 of 1961—decided on 8th May, 1964.

7 (1954) 2 M L J 773 : I L R (1954) Mad. 980 A I R 1954 Mad 772.

8 I L R (1959) A P. 687 : (1959) 2 An W R 122

9 (1958) 2 M L J 463 : I L R. (1958) Mad. 1023: A I.R. 1959 Mad. 40.

came to occupy the lands not infrequently many years after the original grant, would be able to lead evidence on matters principally within the knowledge of the inamdars, and information whereof the inamdars would be interested in withholding, would be to attribute to the Legislature gross ignorance of local conditions. In terms the presumption arises on proof that the grant is an inam expressed to be of a named village, and it arises even if it appears that there have been other minor inams granted for service or other tenure or have been reserved for communal purposes. The *non-obstante* clause in the *Explanation*, in our judgment, does not prescribe a condition for the raising of the presumption. The presumption arises only when it is proved that the grant is expressed to be of a named village, and the burden of proving that the grant is so expressed must lie upon the party who claims to bring the grant within the exception, but once it is proved that the grant is expressed to be of a named village, raising of the presumption will not depend upon proof that certain lands in the village were granted on service or other tenure, or were reserved for communal purposes before the grant of the village.

In expressing in the cases of *Rama Rao*[1], and *Ramadhan Chettiar*[2], the view that the burden lay upon the tenants to prove that the grant was of an estate, it was assumed by the Madras High Court that this Court had rendered a considered decision in the *District Board of Tanjore's case*[3], that the onus of proving that a grant of land is a grant of an estate lies upon the tenant. But it appears that no such decision was given by the Court in that case. In the *District Board of Tanjore's case*[3], the defendant who had taken a lease for three years of a piece of land belonging to the District Board claimed that he had acquired permanent occupancy rights under section 6 of the Madras Estates Land Act, because after the expiry of the period of the lease the Board had not resumed possession. It was the Board's case that after expiry of the period of the lease, the Board had taken possession of the land and had brought it under cultivation. The Subordinate Judge held that the land did not constitute an estate within the meaning of section 3 (2) (*d*). The High Court disagreed with that view. In appeal to this Court Mahajan, J., on a review of the evidence opined that the grant was not of a named village, the grant being in terms of areas and not of a named village, and that there were two grants neither of which could be called a grant of a village. Chandrashekhara Aiyar, J., observed that there were two personal grants under one *parvangi* to two different persons, and it could not be said that there was a grant of a whole village or of a named village, smaller areas having been carved out therefrom prior to the date of the grant on service or other tenure, and the remaining part still being recognised and treated as a revenue unit with a nomenclature of its own. It is abundantly clear that the Court decided the case on evidence and did not place reliance on the onus of proof. It is true that Mahajan, J., in his judgment has recorded that:

"It was conceded by * * * the learned Counsel for the respondent that the burden of proving that *certain lands* constitute an 'Estate' is upon the party who sets up the contention".

and Chandrasekhara Aiyar, J., observed that:

"A small area of 5 acres and 40 cents was granted under the same grant in favour of Chinna Appu Moopan. If this conclusion is correct—and nothing satisfactory has been urged on the side of the respondents why such an inference is not open on the entries, found in the Inam Register, the 1st respondent should fail, as the burden is on him to establish that what was originally granted was an 'estate'."

But these observations are not susceptible of the meaning that when it is proved that an inam is expressed to be of a named village, the presumption under *Explanation* (1) does not arise. Both the learned Judges were of the view that there was no grant which could be regarded as a grant of a whole village or a named village, and on that view the true effect of the *Explanation* did not fall to be determined. The

1 A.I.R. 1957 A.P. 632 (1955) An.W.R. 104
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2. (1957) 1 M.L.J. 348 : A.I.R. 1958 Mad. 3 (1952) 2 M.L.J. 586 : A.I.R. 1953 S.C. 446.

concession before the Court by Counsel was only that when a person alleged that *certain land* was an estate, the burden of proving that case lay upon him.

The second view minimises the operation of the statutory presumption which is expressly enacted by the Legislature to arise on proof that the grant is of a named village. In terms the *Explanation* provides that the grant of an area as a named village shall be deemed to be a grant of an estate. If the clause prescribes the condition on which the presumption arises, the onus would be discharged by the presumption on proof that the grant was of a named village. Adoption of the second view is likely to give rise to some anomalous situations of which the present set of cases is a good illustration. For instance, if the inamdar as well as the tenant sue for a relief in respect of their respective cases, the application of this rule would require the Court to adopt the somewhat unusual course of dismissing the cross-actions, when evidence does not justify a positive inference in favour of either party.

In *Varada Bhavanarayana Rao* v. *State of Andhra Pradesh and others*[1], this Court expressed its preference for the second view. That was a case in which the appellant held a major part of certain villages covered by five inam grants. The Inam Commissioner had granted fresh inam title deeds in confirmation of the original grants. The Special Officer appointed by the Madras Government under section 2 of the Madras Estates Land (Reduction of Rent) Act, 1947, decided that the inam lands covered by the fresh inams were "Estates" within section 3 (2) (*d*) of the Madras Estates Land Act, 1908, and recommended fair and equitable rates of rent for the *ryoti* lands in this estate. Subsequently the Government of Madras by a notification in the Gazette fixed rates of rent in accordance with this recommendation. The inamdar instituted an action in the civil Court for a declaration that the grant was not of an estate within the meaning of section 3 (2) (*d*) of the Madras Estates Land Act. The Trial Court upheld the contention, but the High Court in appeal reversed that decision. In appeal to the Supreme Court it was contended that there were no materials on the record to prove that the original grant was of a whole village or of a village by name, and as the State had failed to discharge the burden of proving that the land constituted an estate, the action must be decreed This Court held that the grant which was later confirmed by the title deed was of a named village, but on proof merely that the inam grant was of a named village, a presumption did not arise that it formed an estate, for the Legislature had not created any special presumption either way. The question of the onus of proof it was said had to be adjudged in the light of sections 101, 102 and 103 of the Evidence Act, and applying that principle if the plaintiff failed to prove his claim that land was not an estate, the appeal should stand dismissed. The Court in that case regarded the judgment in the *District Board of Tanjore's case*[2], as not decisive of the question, and proceeded to hold on two grounds that the Legislature had not provided for raising a presumption either way. First, that the " language used in *Explanation* (1) indicated that the conclusion that the area was an " estate " can be drawn even where the whole of the village was not included in the grant, only if it appeared that the portion not included had already been gifted and was therefore lost to the tenure," and the other that when adding the *Explanation* in 1945, the Legislature did not think fit to make any change in section 23 of the Act.

But as already observed, the language used by the Legislature in enacting *Explanation* (1) to section 3 (2) (*d*) expressly directs a presumption to be raised. That presumption arises when it is proved that a grant as an inam is expressed to be of a named village, the area which forms the subject-matter of the grant shall be deemed to be an estate. Raising of the presumption is not subject to any other conditions. The Legislature has by the *non-obstante* clause affirmed that such presumption shall be raised even if it appears that in the grant are not included certain lands in the village which have before the grant of the named village been granted on service

1 (1964) 2 S.C.J. 523 : (1964) 2 An.W.R. (S.C.) 117 : (1964) 2 M.L.J. (S.C.) 117 : (1964) 2 S.C.R. 501 : A.I.R. 1963 S.C. 1715.

2 (1952) 2 M.L.J. 586 : A.I.R. 1953 S.C. 446.

or other tenure or have been reserved for communal purpose. The presumption, it is true, is not a conclusive presumption it is a presumption of law, and is rebuttable. It may be rebutted by proof of other facts, but not the facts mentioned in the *non-obstante* clause.

Section 23 was added by section 5 of the Madras Estates Land (Third Amendment) Act XVIII of 1936. It reads.

" Where in any suit or proceeding it becomes necessary to determine whether an inam village or a separated part of an inam village was or was not an estate within the meaning of this Act as it stood before the commencement of the Madras Estates Land (Third Amendment) Act, 1936, it shall be presumed, until the contrary is shown, that such village or part was an estate "

The presumption under section 23 in terms applies only to cases in which the question whether an inam village was an estate before the commencement of the Madras Estates Land (Third Amendment) Act, 1936 Under the Act, before it was amended in 1936, a grant of a village could be deemed a grant of an estate where only *melvaram* was granted to the inamdar and not where both the *melvaram* and the *kudivaram* were granted By enacting section 23 the Legislature intended to declare that in determining whether under a grant of an inam village both *varams* were granted or only the *melvaram* was granted, it shall be presumed, until the contrary was shown, that such village or part thereof was an estate, that is, only the *melvaram* was granted. Under the Act before its amendment, one of the conditions of the applicability of section 3 (2) (*d*) was that the grant in favour of the inamdar was only of the *melvaram*, and that it did not include the *kudivaram*, and the Legislature by section 23 as amended provided that in a dispute arising between the landlord and tenant whether an inam village was or was not an estate, it was to be presumed that it was only of the *melvaram* Enactment of this section was apparently found desirable because of certain decisions of the Judicial Committee In *Suryanarayana* v. *Patanna*[1], and *Upadrashta Venkata Sastrulu* v. *Divi Seetharamudu and others*[2], the Judicial Committee expressed the view that where there was no evidence of the terms of an ancient grant, there was no presumption that it was of *melvaram* alone. The Madras High Court, in *Muthu Goundan* v. *Perumal Iyen*[3], held that the ground on which the decisions of the Judicial Committee proceeded, though it was not necessary for the purpose of those cases to so decide, a presumption that the grant was of both the *varams* was deducible. The Judicial Committee overruled this decision in *Chidambara Sivaprakasa Pandara Sannadhigal* v. *Veerama Reddi*[4], and held that in each case the question was one of fact to be determined on the evidence. The Legislature then intervened and enacted the presumption applicable only to cases arising under the unamended Act. Undoubtedly if cases arising under amended Act, the conditions on which the presumption will arise are prescribed in the *Explanation* (1). The language used by the Legislature in the amended section 23 clearly shows that the section was not intended to deal with cases arising under the Madras Estates Land Act as amended by Act XVIII of 1936. Any reference in section 23 to a presumption in respect of cases arising after clause (*d*) as recast by Act XVIII of 1936 would have been wholly out of place. There were two presumptions which applied to different situations. In cases which arose before the Amending Act of 1936 the presumption under section 23 applied · in cases which arose since the amendment of 1936 the presumption prescribed by the *Explanation* (1) applied This is so, because the *Explanation* though enacted by Act II of 1945 has been brought into force since the date on which the amending Act of 1936 became operative.

In our view the following passage from the decision of the Madras High Court in *Mantravadi Bhavanarayana and another* v. *Merugu Venkatadu and others*[5], correctly interprets section 3 (2) (*d*) :

" It is now settled law that by reason of the amendment made in 1945, which added an explanation to section 3 (2) (d) of the Madras Estates Land Act and numbered it as *Explanation* 1, a grant

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1. (1918) L R 45 I A 209 I L R 41 Mad. 1012 36 M L J 585
2. (1919) L R 46 I A 123 I L R 43 Mad. 166 . 37 M L J 42
3. (1921) I L.R 44 Mad 538.
4. L R (1922) 49 I A 286 I L R 45 Mad 586 43 M L J 640 A I R 1922 P C 292
5. I L R (1954) Mad 116 (1953) 2 M L J. 748 A I.R 1954 Mad 415

constitutes an estate if it is expressed to be a named village irrespective of the fact that some of the lands in the village had already been granted on inam or service grants, or were reserved for communal purposes "

We do not deem it necessary to decide whether the suit for a mere declaration that the tenants were not occupancy tenants at the instance of the *shortriemdars*, after determining the tenancy of some of the tenants was maintainable. The High Court has dismissed the suit against defendants 1 to 10 who were served with notices to quit, but against whom the *shrotriemdars* did not claim a decree for possession. There is no appeal by the *shrotriemdars* before us against defendants 1 to 10, and in any event on the view taken by us, the suit of the *shrotriemdars* must fail in its entirety.

In Appeal No 342 of 1961 the decision recorded by us on the principal question does not put an end to the litigation. The dispute arose between two rival claimants to the rights of occupancy in a piece of land. The respondent in this appeal claims that he is a transferee of the original tenant, and the appellant claims to have acquired the rights of occupancy from the *shrotriemdar*. In Suit No. 93 of 1947, four substantive issues were raised, and the issues are discussed in paragraphs 106 to 120 of the judgment of the Trial Judge. The High Court did not separately deal with those issues, but decided Appeal No. 789 of 1950 on the view of the law which it declared in the principal appeal. We have disagreed with the High Court for reasons already set out and the other issues which have not been tried by the High Court have now to be tried.

On the view taken by us Civil Appeal No. 341 of 1961 will be allowed, and the decree passed by the High Court set aside and the decree passed by the Trial Court restored with costs throughout. In Civil Appeal No. 343 of 1961 also the decree passed by the High Court will be set aside and the suit decreed with costs throughout. There will be one hearing fee in this Court.

In Civil Appeal No. 342 of 1961 arising out of Appeal No. 789 of 1950 from suit No. 93 of 1947, the appeal will be remanded to the High Court with a direction that the questions which remain to be determined will be decided according to law. No order as to costs in Appeal No. 342 of 1961.

V.S. ——— *Ordered accordingly*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction )

PRESENT :—P B GAJENDRAGADKAR, *Chief Justice*, K N WANCHOO, M HIDAYATULLAH, J C SHAH AND S M SIKRI, JJ.

The Singareni Collieries Co , Ltd. .. *Appellant**

*v.*

The Commissioner of Commerical Taxes, Hyderabad and another .. *Respondents.*

The State of Madhya Pradesh and four others .. *Interveners*

*Hyderabad Sales Tax Act (XIV of* 1950), *section* 2 (k)—*Coal Control Order,* 1945—*Coal supplied under authorisation of the Coal Commissioner to allottees resident outside the State—Turnover, if liable to sales tax under the Act—Constitution of India* (1950), *Article* 286 (1) (*a*) Explanation—*Effect of—Central Sales Tax Act* (*LXXIV of* 1956), *section* 3

The appellant, the Singareni Colleries, under the authorisation by the Coal Commissioner acting under the provisions of the Coal Control Order, 1945, loaded coal at Singareni colliery site in railway wagons making out a sale-note, F O R with 'freight to pay' and despatched the same to the allottees residing or carrying on business outside Hyderabad State (later Andhra Pradesh) The appellant claimed exemption from the sales tax under the Hyderabad Sales Tax Act, and the claim was allowed for the financial years 1954-55 and 1955-56 but was rejected for the period 1956-57 The revision to the High Court of Andhra Pradesh, against the order rejecting the claim for exemption under Article

* C.As. Nos. 950 to 952 of 1963. 12th October, 1965.

286 of the Constitution, was unsuccessful Meanwhile the Commissioner of Commercial Taxes issued notices to show cause why the orders of assessment for the two previous years also should not be reopened and the sales charged to tax and by his orders brought them also to tax The High Court, on appeal, rejected the claim of exemption as well as on the ground that the re-opening was barred by time but granted a certificate and the instant three appeals are preferred against the said orders of assessment confirmed by the decisions of the High Court An additional ground of objection based on the decision of the Supreme Court in *New India Sugar Mills case*, (1964) 1 S C J 644 (1963) 14 S.T C. 316, that the transactions would not amount to sales was also urged

*Held*, the contention that the supply of coal to consumers pursuant to directions of the Coal Commissioner were not sales and therefore the taxing provisions of the State Sales Tax Act, were not attracted, was never raised at any prior stage and need not be considered in the view the Court takes on the other contentions. (The appeals were dealt on the footing that the transactions were sales)

Under the scheme of the Coal Control Order, 1945, coal supplied was meant for consumption by the allottee and therefore when the allottee was outside the State it was supplied for consumption in the State in which the allottee resided and carried on business

In view of the legislative developments during the period in question, the three assessment years may be divided into four sub-periods 1st April, 1954 to 6th September, 1955 ; 7th September, 1955 to 10th September, 1956 , 11th September, 1956 to 4th January, 1957 , and 5th January, 1957 to 31st March, 1957.

The expression 'actually delivered' in the *Explanation* to Article 286 (1) (*a*) does not include mere symbolic or notional delivery. The rule in section 39 (1) of the Sale of Goods Act, 1930, has no application in dealing with a constitutional provision which while imposing a restriction upon the legislative power of the States entrusts exclusive power to levy sales tax to the State in which the goods have been *actually delivered for purpose of consumption* It is immaterial whether the property in the goods passed in the State from which they were despatched Vide *Bajrung Jute Mills* v *State of Andhra*, (1964) 15 S T C 430 S.C.

The determination of the State in which the sale shall be deemed to have taken place is artificially determined by the delivery for the purpose of consumption not by the terms of the contract of sale nor by the legal concept of passing of property in the goods sold vide *Bengal Immunity case*, (1955) 2 S C J. 672 · (1955) 2 S C R 603

Sales tax under the Hyderabad Sales Tax Act on transactions of coal delivered to the Railway or other carrier for delivery for consumption outside the State of Hyderabad (during the period 1st April, 1954 to 6th September, 1955) is therefore not leviable by virtue of the *Explanation* to Article 286 (1).

For the period 6th September, 1955 to 10th September, 1956, the turnover from sale of coal actually delivered outside the State of Andhra for consumption therein, would also be exempt from liability as the *Explanation* continued to remain in force till 10th September, 1956, and the State had during that period no power to levy sales tax on inter-State sales.

For the period 11th September, 1956 to 4th January, 1957, Article 286 (2) stood repealed and there was no power in the State to tax an inter-State sale. For the period 5th January, 1957 to 31st March, 1957, the power to tax the sales was governed by the Central Sales Tax Act, 1956, (they being deemed inter-State sales under section 3 thereof) and so the sales tax on coal despatched in this period cannot be levied by the Andhra Pradesh State (in which the area was merged).

Thus coal, in the appeals under review was transported from the colliery of the appellant company to consumers outside the State as a result of the covenant or incident of the contract of sale and therefore the sales must be regarded as inter-State sales and not liable to be taxed under the Hyderabad Sales Tax Act.

Appeals from the Judgment dated the 15th November, 1960 of the Andhra Pradesh High Court in T.R.C No 17 of 1960 and dated the 25th July, 1961 in Special Appeals Nos. 1 and 2 of 1961.

*N. A Palkhivala*, Senior Advocate (*S N. Andley*, *Rameshwar Nath*, *P. L. Vohra* and *Mohinder Narain*, Advocates of *M/s' Rajinder Narain & Co*, with him), for Appellant.

*D Muni Kanniah*, Senior Advocate, (*T. V R Tatachari*, Advocate, with him), for Respondents.

*M Adhikari*, Advocate-General for the State of Madhya Pradesh (*I N. Shroff*, Advocate, with him), for Intervener No 1 (State of M P).

*M C. Setalvad* and *N A Palkhivala*, Senior Advocates (*A P. Sen* and *R. K. P. Shankardas*, Advocates and *J B. Dadachanji*, *O C Mathur* and *Ravinder Narain*, Advocates, of *M/s J B Dadachanji & Co*, with them), for Intervener No. 2) Amalgamated Coal Fields, Ltd ).

*N. A Palkhivala*, Senior Advocate, (*A P Sen* and *R K. P Shankardas*, Advocates, and *J B Dadachanji*, *O C Mathur*, and *Ravinder Narain*, Advocates, of *M/s. J. B. Dadachanji & Co*, with him), for Intervener No. 3 (Panch Valley Coal Co., Ltd.)

*J B Dadachanji*, Advocate of *M/s J. B Dadachanji & Co*, for Intervener No. 4 (Perfect Pottery, Ltd ).

*S. V Gupte*, Solicitor-General of India (*R N Sachthey*, Advocate, with him), for Intervener No. 5 (The Attorney-General of India).

The Judgment of the Court was delivered by

*Shah, J.*—The question which falls to be determined in these appeals is:

"Whether the appellant Company is liable to pay sale tax assessed under the Hyderabad General Sales Tax Act, 1950 on the price of coal supplied to allottees outside the taxing State pursuant to directions of the Coal Commissioner issued under the Colliery Control Order, 1945 "

The Company which has its registered office at Hyderabad in the former Part 'B' State of Hyderabad, and now in the State of Andhra Pradesh, carried on the business of mining coal from its collieries and supplying it to consumers in and outside the State of Hyderabad.

These appeals relate to three financial years 1954-55, 1955-56 and 1956-57, during which coal was a controlled commodity and its disposal and use could be made only under orders issued by the appropriate authority under the Colliery Control Order, 1945 The Company claimed that Rs. 1,75,67,286-1-2 in the year 1954-55, Rs 1,17,39,636-11-8 in the year 1955-56 and Rs 1,55,18,937-6-5 in the year 1956-57 were not liable to be included in the taxable turnover for levying sales tax under the Hyderabad General Sales Tax Act, 1950, because the State Legislature which enacted that Act was, by Article 286 of the Constitution, prohibited from imposing tax on transactions of supply of coal outside the limits of the State under orders of the Coal Commissioner

The Commercial Tax Officer, Hyderabad, admitted the claim of the Company for the years 1954-55 and 1955-56 for exemption from liability The claim of the Company for the year 1956-57 was however rejected. The Company appealed to the Deputy Commissioner of Commercial Taxes and to the Sales Tax Appellate Tribunal, Hyderabad, against the order of assessment for the year 1956-57, but without success The Company then applied to the High Court of Andhra Pradesh in its revisional jurisdiction, and submitted in support of its claim that a part of its turnover was exempt from liability to sales tax under the Hyderabad General Sales Tax Act because the turnover was in respect of sales, (*a*) which had taken place outside the State within the meaning of Article 286 (1) (*a*) read with the *Explanation* thereto, and (*b*) which were effected in the course of inter-State trade or commerce, and the Parliament had not by law removed the ban against imposition of tax on such sales by the State Legislature. The High Court rejected these contentions. In the meanwhile the Commissioner of Commercial Taxes issued notices to the Company to show cause why the orders of assessment for the years 1954-55 and 1955-56 should not be reopened and why the sales which were exempted by the order of the Commercial Tax Officer should not be charged to tax, and by his orders respectively dated 8th February, 1961 and 16th November, 1960 for the two years 1954-55 and 1955-56 brought to tax the turnover which was previously treated as exempt. The orders were carried to the High Court in appeal and the same grounds which were set up in the revision application relating to the assessment year 1956-57 were set up, beside the ground that the action for reopening the assessments by the

Commissioner of Commercial Taxes was barred by limitation and was therefore incompetent. The High Court rejected these contentions. With certificate granted by the High Court, these appeals are preferred by the Company.

At the material time, by section 2 (*k*) of the Hyderabad General Sales Tax Act, 1950, the expression " sale " was defined as under :

" ' Sale ' with all its grammatical variations and cognate expressions means every transfer of property in goods by one person to another in the course of trade or business for cash or for deferred payment or other valuable consideration and includes also a transfer of property in goods involved in the execution of a works contract, but does not include a mortgage, hypothecation, charge or pledge.

........................................................ .... . . ...

*Explanation* 2 —Notwithstanding anything to the contrary in any other law for the time being in force, a transfer of goods, in respect of which no tax can be imposed by reason of the provisions contained in Article 286 of the Constitution, shall not be deemed to be 'sale' within the meaning of this clause.'"

The *Explanation* was evidently introduced into the definition with a view to avoid its operation on transactions which are outside the taxing power of the States by virtue of Article 286 of the Constitution.

In these appeals, the Company submitted in the first instance that within the meaning of the Hyderabad General Sales Tax Act, there was no sale of coal which was supplied to the consumers pursuant to directions issued by the Coal Commissioner and therefore the taxing provisions of the Act were not attracted, and placed reliance in support thereof on the judgment of this Court in *New India Sugar Mills, Ltd* v *Commissioner of Sales Tax, Bihar*[1]. But this contention was never raised at any stage before the taxing authorities or even before the High Court, and on the view we take on the other contentions raised in these appeals, we need not consider this contention. We proceed to deal with these appeals on the footing that the transactions under which coal was supplied by the Company to the consumers as directed by the Coal Commissioner were sales under the general law of sale of goods.

Two questions arise for determination :

(1) Whether the transactions of sale were " *Explanation* sales " and on that account hit by Article 286 (1) (*a*) of the Constitution, before it was amended by the Constitution (Sixth Amendment) Act, 1956 , and

(2) Whether those transactions were sales which took place in the course of inter-State trade or commerce.

It is urged that for a part of the period to which these appeals relate, the sales are hit by both the legislative bans contained in Article 286 (1) (*a*) and Article 286 (2), and for the rest by one or the other of such bans.

It is necessary in the first instance to summarise the provisions of the Colliery Control Order, 1945, and to set out the manner in which coal was supplied by the Company to its constituents. The Central Government was authorised by notification to fix the price of coal or different prices for different grades of coal which may be sold by colliery owners (clause 4). The colliery owners and their agents were prohibited from selling, or offering for sale coal at a price different from the price fixed in that behalf under clause 4 and from granting or agreeing to grant any commission, rebate or such other concession in any form having the effect of reducing either directly or indirectly the said price (clause 5) A colliery owner could with the consent of the Deputy Coal Commissioner sell coal at the price fixed under clause 4 direct to a consumer, if an allotment was made by the Deputy Coal Commissioner to the consumer for such direct sale (clause 6) The Central Government could issue directions to any colliery owner regulating the disposal of his stocks of coal or of the expected output of coal in the colliery during any period (clause 8) and notwithstanding any contract to the contrary, every colliery owner to whom a direction was given under clause 8 had to dispose of coal in accordance therewith and could not dispose of coal in contravention thereof (clause 9) The Coal Commissioner

1. (1964) 1 S C J 644 · (1963) 2 S C R (Supp ) 1207. 459: (1963) 14 S T.C. 316 (S C.) : A.I.R. 1963 S.C.

could order that coal despatched by any colliery owner to any person which was in transit (termini whereof were defined by the *Explanation*) shall subject to terms and conditions if any imposed by the Coal Commissioner be diverted and delivered to another person specified in the order (clause 10-A (1)). As soon as an order was made under sub-clause (1), all the rights of the consignee, the owner of the colliery or other person in the consignment of coal were, subject to the terms of the order, to devolve upon and vest in the person to whom the coal was to be delivered under the order (clause 10-A (2)). An allottee of coal could not use it otherwise than in accordance with the conditions of the order of allotment, nor divert or transfer any such coal to any other person except under a written authority from the Central Government (clause 12-B); and no person could acquire or purchase or agree to acquire or purchase coal from a colliery, and no colliery owner could despatch or agree to despatch or transport any coal from the colliery except under the authority and in accordance with the authority of the Central Government (clause 12-E).

Broadly speaking the scheme of the Colliery Control Order was that no person could acquire or purchase or agree to acquire or purchase any coal from a colliery and no colliery owner could sell or agree to sell or despatch coal from the colliery, except under the authority and in accordance with the conditions prescribed by the Coal Commissioner, and that the person to whom coal was supplied also could not utilise it for a purpose other than the purpose for which it was supplied, nor could he dispose of coal supplied to him Supply, use and disposal of coal were therefore regulated from the stage of production till consumption.

The manner in which the Colliery Control Order was administered is illustrated by certain documents on the record. The Coal Commissioner addressed a letter to a colliery authorising it to despatch on the request of the specified consumers coal not exceeding the quantities mentioned during certain months and according to the Schedule appended In the Schedule appended to the letter were set out the names of the concerns to whom coal was to be supplied. Intimation of the despatch instructions was given to the consumers individually. Acting upon this intimation, the consumer addressed a letter to the colliery requesting that the quantity of coal allotted may be despatched to him by train and gave instructions regarding booking, the name of the person to whom coal may be consigned, and also about the collection of price of coal supplied. The colliery then loaded coal in railway wagons making out a "sale note" mentioning the cost per ton F O R. Colliery with "freight to pay" and despatched the same by rail to the consumer at the destination requested. In the "sale note" were set out the name of the buyer, grade and quantity of coal allotted, the terms of sale, cost per ton F.O.R. Colliery, other charges, and particulars of despatch, such as the name of the Railway Station to which the coal should be booked and the name of the consignee. The sale note was subject to conditions of sale, that the colliery shall not be responsible for non-delivery or late delivery of coal or for any loss occasioned in consequence of fire, snow, heat, flood, strikes, lock-outs, shortage of wagons, restrictions on booking, accidental losses, etc. that any taxes, export duty, cess or other charges not in force imposed by the Government after the date of the sale note shall be borne by the purchaser; that the colliery reserved the right to demand payment in advance and to have a right of lien on all coal despatched until it was paid for; that the sale note was subject to the quantity allotted by the Deputy Coal Commissioner for buyers outside the State and in the event of the Deputy Coal Commissioner cancelling the whole or any part of the said allotment, such cancellation shall be deemed to apply equally to the sale note.

Under the terms of the "sale note" the property in the coal consigned passed, so far as the colliery was concerned, to the allottee—original or substituted—when the goods were loaded into the railway wagons for conveyance, and thereafter all losses and any new taxes imposed were to be borne by the purchaser, the colliery having only a right of lien on coal not paid for. Coal supplied was meant for consumption by the allottee; therefore when the allottee was outside the State, it was supplied for the purpose of consumption in the State in which the allottee resided or carried on business.

In view of the legislative developments which we will presently notice, the period of the three assessment years may be divided into four sub-periods. They are: 1st April, 1954 to 6th September, 1955; 7th September, 1955 to 10th September, 1956; 11th September, 1956 to 4th January, 1957 and 5th January, 1957 to 31st March, 1957. In making this sub-division we have not taken into account the application of the States Reorganisation Act as a result of which on 1st November, 1956, the Part 'B' State of Hyderabad ceased to exist and the State of Andhra Pradesh came into existence by merger of certain areas including parts of the State of Hyderabad. The effect of the Reorganisation Act had a bearing only on the territorial operation of the constitutional prohibitions under Article 286.

Under the Government of India Act, 1935, it was open to every Provincial Legislature to enact legislation authorising the levy of tax on sale of goods in respect of transactions whether within or outside the Province, provided the Province had a territorial nexus with one or more elements constituting the sale This resulted in levy of sales tax by many Provinces in respect of the same transaction—each Province fixing upon one or more elements constituting the sale with which it had a territorial nexus The Constitution with a view to prevent imposition of manifold taxes on the same transaction of sale imposed by Article 286 restrictions on the levy of sale and purchase taxes on certain classes of transactions Article 286, as it was originally enacted, read as follows:

"(1) No law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place—

(*a*) outside the State; or

(*b*) in the course of the import of the goods into, or export of the goods out of, the territory of India.

*Explanation*—For the purposes of sub-clause (*a*), a sale or purchase shall be deemed to have taken place in the State in which the goods have actually been delivered as a direct result of such sale or purchase for the purpose of consumption in that State, notwithstanding the fact that under the general law relating to sale of goods the property in the goods has by reason of such sale or purchase passed in another State

(2) Except in so far as Parliament may by law otherwise provide, no law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of any goods where such sale or purchase takes place in the course of inter-State trade or commerce:

Provided that the President may by order direct that any tax on the sale or purchase of goods which was being lawfully levied by the Government of any State immediately before the commencement of this Constitution shall, notwithstanding that the imposition of such tax is contrary to the provisions of this clause, continue to be levied until the thirty-first day of March, 1951.

(3) No law made by the Legislature of a State imposing, or authorising the imposition of, a tax on the sale or purchase of any such goods as have been declared by Parliament by law to be essential for the life of the community shall have effect unless it has been reserved for the consideration of the President and has received his assent"

Article 286 thus imposed *qua* sales four bans upon legislative power of the States. Clause (1) prohibited every State from imposing or authorising the imposition of, a tax on outside sales and on sales in the course of import into or export outside the territory of India. By clause (2) the State was prohibited from imposing tax on the sale of goods where such sale took place in the course of inter-State trade or commerce. But the ban could be removed by legislation made by the Parliament. By clause (3) the Legislature of a State was incompetent to impose or authorise imposition of a tax on the sale or purchase of any goods declared by the Parliament by law to be essential for the life of the community, unless the legislation was reserved for the consideration of the President and had received his assent.

This Court in *The Bengal Immunity Company, Ltd* v. *State of Bihar*[1], held that the operative provisions of the several parts of Article 286, namely clause (1) (*a*), clause (1) (*b*), clause (2) and clause (3), are intended to deal with different topics and one can not be projected or read into another, and therefore the *Explanation* in clause (1) (*a*) cannot legitimately be extended to clause (2) either as an exception or as a proviso thereto or read as curtailing or limiting the ambit of clause (2) This Court further held that until the Parliament by law made in exercise of the powers vested

1. (1955) S.C.J. 672 : (1955) 2 M.L.J. (S.C) 168 : (1955) An.W.R. 422 (S.C.) : (1955) 2 S.C.R. 603 : A.I.R. 1955 S.C 661.

in it by clause (2) of Article 286 provides otherwise, no State may impose or authorise the imposition of any tax on sales or purchases of goods when such sales or purchases take place in the course of inter-State trade or commerce, and therefore the State Legislature could not charge inter-State sales or purchases until the Parliament had otherwise provided. The judgment in the *Bengal Immunity Company's case*[1] was delivered on 6th September, 1955 The President then issued the Sales Tax Laws Validation Ordinance, 1956, on 30th January, 1956, the provisions of which were later embodied in the Sales Tax Laws Validation Act, 1956 By this Act notwithstanding any judgment, decree or order of any Court, no law of a State imposing or authorising the imposition of, a tax on the sale or purchase of any goods where such sale or purchase took place in the course of inter-State trade or commerce during the period between the 1st day of April, 1951 and the 6th day of September, 1955, shall be deemed to be invalid or ever to have been invalid merely by reason of the fact that such sale or purchase took place in the course of inter-State trade or commerce ; and all such taxes levied or collected or purported to have been levied or collected during the aforesaid period shall be deemed always to have been validly levied or collected in accordance with law The Parliament thereby removed the ban contained in Article 286 (2) of the Constitution retrospectively but limited only to the period between 1st April, 1951 and 6th September, 1955. All transactions of sale, even though they were inter-State could for that period be lawfully charged to tax But Article 286 (2) remained operative after 6th September, 1955 till the Constitution was amended by the Constitution (Sixth Amendment) Act, *i e*, 11th September, 1956. By the amendment, the *Explanation* to clause (1) of Article 286 was deleted and for clauses (2) and (3) the following clauses were substituted :

"(2) Parliament may by law formulate principles for determining when a sale or purchase of goods takes place in any of the ways mentioned in clause (1).

(3) Any law of a State shall, in so far as it imposes or authorises the imposition of, a tax on the sale or purchase of goods declared by Parliament by law to be of special importance in inter-State trade or commerce, be subject to such restrictions and conditions in regard to the system of levy, rates and other incidents of the tax as Parliament may by law specify "

By clause (2) of Article 286 as amended, the Parliament was authorised to formulate principles for determining when a sale or purchase of goods takes place in any of the ways mentioned in clause (1), namely, outside the State or in the course of the import into, or export out of the territory of India. By the Constitution (Sixth Amendment) Act, the Parliament was entrusted with power under Article 269 (3) to formulate principles for determining when a sale or purchase of goods takes place in the course of inter-State trade or commerce ; and to effectuate the conferment of that power in the Seventh Schedule, Entry 92-A was added in the First List and Entry 54 in the Second List was amended The Parliament enacted, in exercise of that power, the Central Sales Tax Act LXXIV of 1956 (which became operative as from 5th January, 1957) to formulate principles for determining when a sale or purchase of goods takes place in the course of inter-State trade of commerce or outside a State or in the course of import into or export from India, and to provide for the levy, collection and distribution of taxes, on sales of goods in the course of inter-State trade or commerce and to declare certain goods to be of special importance in inter-State trade or commerce, etc.

For the period 1st April, 1954 to 6th September, 1955 therefore transactions which were inter-State were deemed, because of the Sales Tax Laws Validation Act, taxable by the States—the bar contained in Article 286 (2) having been retrospectively removed For the period 7th September, 1955 to 10th September, 1956 Article 286 (2) having remained in operation and the Sales Tax Laws Validation Act, 1956, not having been extended to cover that period, inter-State sales could not be taxed by the State Legislature. During the period 11th September, 1956 to 4th January, 1957 Article 286 (2) stood repealed by the Constitution (Sixth Amendment) Act, 1956, but the Parliament had assumed to itself the power under Entry

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1. (1955) S C J. 672 : (1955) 2 M L J. (1955) S C R. 603 · A I R 1955 S.C 661. (S C.) 168 (1955) An.W R. 422 (S C) :

92-A of the First List in the Seventh Schedule to tax sale or purchase of goods where such sale or purchase takes place in the course of inter-State trade or commerce. In exercise of the power to formulate principles for determining when a sale or purchase of goods takes place in the course of inter-State trade or commerce, the Parliament enacted the Central Sales Tax Act, 1956 which was brought into force on 5th January, 1957, and after that date inter-State sales could be taxed under the provisions of the Central Sales Tax Act.

The Company claims that the transactions which are sought to be charged for the period between 1st April, 1954 to 6th September, 1955 are not taxable, because they were covered by *Explanation* to clause (1) (*a*) of Article 286 of the Constitution, before it was amended For the period between 7th September, 1955 and 10 h September, 1956, it is claimed the transactions are not taxable, because they are covered by the *Explanation* to Article 286 (1) and also because they are inter-State sales For the period 11th September, 1956 to 4th January, 1957 the transactions are not taxable, because they are inter-State sales not chargeable under any statute—State or Parliamentary—and for the period 5th January, 1957 to 31st March, 1957, the transactions are not chargeable by the State because they are inter-State and are chargeable under the Central Sales Tax Act alone

The true effect of *Explanation* to Article 286 (1) and Article 286 (2) gave rise to conflicting opinions, but it is unnecessary to enter upon a discussion of earlier cases, for the principles applicable thereto have now been settled by decisions of this Court as to what transactions are covered by the *Explanation* to clause (1) of Article 286 before it was amended.

In *Shree Bajrang Jute Mills, Ltd*, *Guntur* v. *The State of Andhra Pradesh*[1], it was held by this Court that a sale falls within the *Explanation* to Article 286 (1) (*a*) if goods have actually been delivered as a direct result of the sale for the purpose of consumption in the State in which they are delivered, and the expression " actually delivered " in the context in which it occurs can only mean physical delivery of the goods, or such other action as puts the goods in the possession of the purchaser. The expression " actually delivered " does not include mere symbolical or notional delivery *e g* , by entrusting the goods to a common carrier, or even by delivery of documents of title like railway receipts. It was said that the rule contained in section 39 (1) of the Indian Sale of Goods Act, 1930 has no application in dealing with a constitutional provision which while imposing a restriction upon the legislative power of the States entrusts exclusive power to levy sales tax to the State in which the goods have been actually delivered for the purpose of consumption. The Court also held that if the goods were actually delivered for consumption in another State it was immaterial whether the property in the goods passed in the State from which they were despatched

Counsel for the State of Andhra Pradesh contended that in the present case coal despatched from the territory of the taxing State to purchasers in other States was actually delivered within the taxing State and therefore the principle of *Shree Bajrang Jute Mill's case*[1], did not apply to those transactions. That contention has however no force. The *Explanation* defines the State in which the goods have actually been delivered for consumption, as the State in which for the purpose of clause (1) (*a*) of Article 286 the sale shall be deemed to have taken place. That State alone in which the sale is deemed to take place has the power to tax the sale, and for this purpose it is immaterial that property in the goods has under the general law relating to sale of goods passed in another State in which the allottee resided or carried on business Delivery of coal to the Railway Administration may amount to delivery to the allottee for the purpose of the general law relating to sale of goods, but thereby coal cannot be said to be " actually delivered " within the meaning of the *Explanation* to Article 286 (1) (*a*) It is also true that under the terms of the sale-note under which coal was despatched on terms F O R Singareni the

1. (1964) 2 S C J 540 : (1964) 2 M L J (S C) (S C).
122 : (1964) 2 An.W.R. (S.C.) 122 15 S.T.C 430

Company was not responsible for loss or damage to the consignment after it was loaded in the wagons, that may indicate that the Company had no property in the goods after it was in transit. But determination of the State in which sale shall be deemed to have taken place is artificially determined—not by terms of the contract of sale, nor by the legal concept of passing of property in the goods sold by the delivery for the purpose of consumption As observed by Das, Ag.C.J. in the *Bengal Immunity Company's case*[1] :

"The shifting of situs of a sale or purchase from its actual 'situs' under the general law to a fictional 'situs' under the *Explanation* takes the sale or purchase out of the taxing power of all States other than the State where the 'situs' is fictionally fixed "

Sales tax under the Hyderabad General Sales Tax Act on transactions of coal delivered to the Railway or other carrier for carriage to places outside the taxing State and for delivery for consumption therein is therefore not leviable by virtue of the *Explanation* to Article 286 (1).

For the period 7th September, 1955 to 10th September, 1956, the turnover from sale of coal actually delivered outside the State of Andhra for consumption in those States would also be exempt from liability, because the *Explanation* continued to remain in force, till 10th September, 1956 The Company would also be entitled to exemption from liability to tax because the State had during that period no power to levy tax on inter-State sales. As pointed out by Venkatarama Ayyar, J , in the *Bengal Immunity Company's case*[1].

"A sale could be said to begin the course of inter-State trade only if two conditions concur : (1) A sale of goods, and (2) a transport of those goods from one State to another under the contract of sale Unless both these conditions are satisfied, there can be no sale in the course of inter-State trade."

In these transactions relating to supply of coal, which we have assumed are sales, coal was transported in pursuance of the allotment orders to other States. We have also assumed for the purpose of this argument, that compliance with allotment orders resulted in a contract of sale. The transactions were unquestion in the course of inter-State trade.

For the period 11th September, 1956 to 4th January, 1957, Article 286 (2) stood repealed and there was no power in the State to tax an inter-State sale. For the period between 5th January, 1957 and 31st March, 1957 the power to tax inter-State sales was governed by the Central Sales Tax Act, 1956. By the Constitution (Sixth Amendment) Act amending Article 286 (2) and incorporating Entry 92-A in List I of the Seventh Schedule read with Article 269 (3) the power to tax sales in the course of inter-State trade or commerce rested with the Central Government. Sales tax for the period from 5th January, 1957 to 31st March, 1957, has not been levied under the Central Sales Tax Act, 1956, and if the transactions by the Company were taxable under that Act, the State of Andhra Pradesh had no power to tax those transactions. As transactions of sale in the course of inter-State trade or commerce within the meaning of section 3, they could not be taxed under the Hyderabad General Sales Tax Act, 1950. Section 3 of the Central Sales Tax Act, 1956 provides that

" a sale * * * * of goods shall be deemed to take place in the course of inter-State trade or commerce if the sale * * * * occasions the movement of goods from one State to another or is effected by a transfer of documents of title to the goods during their movement from one State to another."

In *Tata Iron and Steel Company, Ltd.* v. *S R Sarkar*[2], this Court held that clause (*a*) of section 3 covers sales in which the movement of goods from one State to another is the result of a covenant or incident of the contract of sale, and property in the goods passes in either State. That view was reaffirmed in *The State Trading Corporation*

1. (1955) S C J 672 (1955) 2 M.L J (S C) 168 : (1955) An W R 422 (S C): (1955) 2 S.C R 603 : A I R. 1955 S C. 661.
2. (1961) 1 S C.R. 379 : A I R. 1961 S C 65

*of India, Ltd and another* v. *The State of Mysore and another*[1], and *Cement Marketing Company of India* v. *State of Mysore*[2].

Coal in the appeals under review was transported from the colliery of the Company to the consumers outside the taxing State, as a result of the covenant or incident of the contract of sale and therefore the sale must be regarded as an inter-State sale and not liable to be taxed under the Hyderabad General Sales Tax Act, 1950. The High Court was, in our view, in error in holding that the turnover of the Company in which coal was loaded in railway wagons for conveyance to places outside the taxing State was taxable under the Hyderabad General Sales Tax Act. In that view we do not think it necessary to decide whether the Commissioner of Commercial Taxes was right in reopening the assessments for the years 1954-55 and 1955-56 in the manner he has purported to do

The appeals are allowed and the order passed by the High Court is set aside. It is declared that the turnover of the Company amounting to Rs. 1,75,67,286-1-2 for the year 1954-55 ; Rs 1,17,39,636-11-8 for the year 1955-56 and Rs. 1,55,18,957-6-5 for the year 1956-57 was exempt from liability to sales tax under the Hyderabad General Sales Tax Act, 1950 The Company will be entitled to its costs in the appeals in this Court and the High Court. There will be one hearing fee.

K.G.S. *Appeals allowed.*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, *Chief Justice*, K. N. WANCHOO, M. HIDAYATULLAH, V. RAMASWAMI AND P. SATYANARAYANA RAJU, JJ

The Roman Catholic Mission and others .. *Appellants**

*v.*

The State of Madras and others. .. *Respondents.*

*Evidence—Secondary evidence—Copies of original documents—Admissibility*

Inam *grants—Kinds of—On evidence held* inam *comprised only* melwaram *and was for remuneration of* archaka *service of temple—Was therefore liable for resumption under section 44-B of Madras Hindu Religious Endowments Act (II of* 1927) *on its alienation.*

*Words and Phrases*—Devadayam *and* Stalathar poruppu manyam

*Inam Fair Register—Evidenciary value—Is an 'act of State'—Declarations therein have supreme importance*

*Madras Hindu Religious Endowments Act (II of* 1927), *as amended by Madras Acts (XI of* 1934) *and (X of* 1946), *section* 44-B—*Validity.*

*Limitation Act—Imposition of assessment on lands liable to be assessed—No period of limitation*

Copies of original documents would not be admissible in evidence when the originals were not produced at any time nor was any foundation laid for the establishment of the right to give secondary evidence.

*Inams* are of various kinds. They are classified on the basis of concession in land revenue, that is to say, whether the whole of the land revenue is remitted or a part, or whether the land is held subject to a payment of money. Where the whole of the land revenue is remitted the *inam* is known by names such as *Sarva inam, Sarva manyam, Sarva dumbala* or *darobust inam.* When the right to the soil is not included in the *inam* it is known according to the share which was free such as *Ardha manyam*(½). *Chaturbhagam*(¼) etc The third kind of *inam* comprised payment of a quit rent called the *poruppu.*

In *Venkata* v. *Sitaramudu,* 26 M L J 585, it was held by the Privy Council that there was no presumption in law that an *inam* grant even if made to a Brahmin did not include the *kudiwaram.*

1 (1963) 2 S C J 131 : (1963) 3 S C R 792. (1963) 14 S T C 188. A I R 1963 S C 548.

2 (1964) 2 S C J. 287. (1963) 3 S C R 777 : (1963) 14 S.T C. 175 A I R. 1963 S C. 980.

*C A. Nos. 389 of 1964 and 69 of 1965. 14th January, 1966

But the evidence in the instant case point to the fact that the *inam* comprised only the *melwaram*. It was an *inam* where the land was held subject to payment of an amount as quit rent. It was granted to the *archakas* and was recorded in their name.

The *inam* in dispute in the instant case is described in the relevant revenue records as *Devadayam inam* and again as *Stalathar inam poruppu manyam* conducted for Meenakshi Sundareshwaral temple. The *inam* is entered in the names of *Bhattars*. The word *Devadayam* ordinarily is used in revenue records to describe lands attached to a temple and in the dictionaries the meaning is " lands or allowances for the support of a temple." The expression *Sthalathar poruppumanyam* or shortly *Sthala manyam* means lands held at a low or quit rent. Thus it is clear that the *inam* was granted to the *Bhattars* for the performance of service of the temple and not as a personal *inam* to the grantee.

The Inam Fair Register does not mention the name of the original grantee which it would have if the grant was personal. Now in a series of cases the Inam Enquiry has been held by the Privy Council to be a landmark and utmost importance was attached to the Inam Fair Register, the preparation of which was described as a great act of State. The term act of State does not always mean a sovereign act against an alien which is neither grounded in law nor does it pretend it to be so. The term means more than that because it has many meanings. Here it indicates an act in respect of which there was an official declaration. The Inam Fair Register incorporated an official declaration which was the result of detailed enquiries. All evidence collected in respect of each *inam* was carefully sifted and considered before any conclusion was reached or declared. In the absence of positive and proper evidence to the contrary such declaration must possess supreme importance.

The evidence thus clearly show that the *inam* in the instant case was always considered as remuneration for *archaka* service of the temple and on its alienation is liable to be resumed (and was rightly resumed in the present case) under section 44-B of the Madras Hindu Religious Endowments Act (II of 1927).

Section 44-B inserted by the Madras Hindu Religious Endowment (Amendment) Act XI of 1934 in the parent Act II of 1927 and further amended by the Madras Act X of 1946 was not void when the legislature purported to enact it. It was fully within the competence of the provincial legislature to enact the impugned section. It would therefore follow that the section would be sustained by section 292 of the Government of India Act, 1935. Indeed, the power of the provincial legislature under the 1935 Act was no whit less than that of the legislature which enacted the section. Any amendment of the section in 1946 would have clear authority even under the 1935 Act, and the same may be said of the Madras Religious and Charitable Endowments Act, 1951, *vis-a-vis* the Constitution of India.

The theory that contracts between the Secretary of State for India and the inam-holders came into existence by the passing of 32 and 33 Vict c. 29 by the British Parliament, that thereafter the inams could be resumed only by the Crown and that therefore inasmuch as section 44-B of Madras Act II of 1927 conflicted with this position and enabled the Revenue Officers to order resumption it was void, is fallacious. Acts 32 and 33 Vict. c. 29 did not create any contract. It only validated the defective title deeds for the *inams* granted by the Inam Commissioner and no more.

There is no period of limitation prescribed by any law within which alone Government should exercise its prerogative of imposing assessment on land liable to be assessed with public revenue.

Appeals from the Judgments and Orders dated the 14th December, 1959 of the Madras High Cout in A S. Nos. 773 and 787, and Appeal No 734 of 1954 respectively.

*S. G Ramachandra Iyer*, Advocate, and *J B Dadachanji*, *O C. Mathur* and *Ravinder Narain*, Advocates of *M/s J B Dadachanji & Co* , for Appellant (In C. A. No. 389 1964) and Respondent No 1 (In C.A No. 69 of 1965).

*Ranganadham Chetty*, Senior Advocate (*A. V. Rangam*, Advocate with him), for Respondent No. 1(In C A. No 389 of 1964).

*A. V. Viswanatha Sastri*, Senior Advocate (*R Gopalakrishnan*, Advocate with him), for Respondent No 2 (In C.A. No. 389 of 1964) and Appellant (In C A. No 69 of 1965).

The Judgment of the Court was delivered by

*Hidayatullah, J*—In village Vandiyur of Madurai Taluk there are two blocks which bear the names Melapappapathu and Keelapappapathu. The former is 28 90 acres and bears Survey No. 45 (the old Survey No. was 33 and the area 28.75

acres). The extent of the area in *kanies* is 21.9 The other block is Survey No. 78, area 20.88 acres (the old Survey No. was 100 and the area 20 53 acres). The extent of the area in *kanies* is 17 10 These lands were *manyam* lands, that is to say, lands held at a low assessment or altogether free in consideration of services. It is now clear from the record and indeed it is admitted on all hands that they were the subject of an *inam* granted in ancient times by the Rulers and that they were held for the performance of *puja* in Sri Meenakshi Sundareswaral Devasthanam, Madurai. In 1948 the Revenue Divisional Officer, Madurai held, after enquiry, that the *inam* consisted of both *melwaram* and *kudiwaram* and as the *inam* lands had been alienated the *inam* was liable to be resumed. His order was passed on 9th April, 1948, and purported to be under section 44 B of the Madras Hindu Religious Endowments Act, 1927 (Madras Act II of 1927) The *inam* lands were resumed and regranted to the D vasthanam. At that time the lands were in the possession of the Roman Catholic Mission of St Mary's Church, Madurai and were so held by the Mission since October, 1894. Against the order of the Revenue Divisional Officer the Mission appealed to the District Collector under section 44-B (4) of the Act. The appeal was dismissed on 13th March, 1949. The District Collector also held that the *inam* comprised both the *warams*.

The Roman Catholic Mission thereupon instituted a suit in the Court of the Subordinate Judge, Madurai under section 44 B (2) (*d*) of the Act for a declaration that the *inam* consisted only of the *melwaram*. The suit was later withdrawn by the District Judge to his own file and it was registered as O S. No 1 of 1954. The Mission also instituted another suit in the Court of the Subordinate Judge, Madurai which was also withdrawn by the District Judge to his file and was registered as O S. No. 2 of 1954. The Second suit was a mere general one. It also sought the declaration which was the subj ct of O.S. No 1 of 1954 and it questioned both the right to resume the lands as well as the resumption which was ordered by the revenue Courts. In that suit the Mission contended that the particular *inam* was outside the scope of section 44-B of the Madras Act II of 1927 as it was a personal *inam* and not liable to resumption under that section and that the section itself was *ultra vires* the Provincial Legislature. The Province of Madras (now the State of Madras) and Sri Meenakshi Sundareswaral Devasthanam, Madurai were, made defendants.

The District Judge dismissed O.S. No. 1 of 1954, holding that the *inam* consisted of both the *warams*. In O.S. No. 2 of 1954 the same finding was repeated and it was further held that the order of resumption was invalid and without jurisdiction since the *inams* in question were personal *inams* and did not come within the purview of section 44-B The District Judge granted a declaration to that effect and also issued an injunction against the Davasthanam which had not taken possession of he land till then. Against the decision in O S. No. 1 of 1954 the Mission appealed and against the decision in O S No 2 of 1954 the Devasthanam and the State of Madras filed appeals A.S No 734 of 1954 was filed by the Roman Catholic Mission against the decision in O S No 1 of 1954 and A S. No 773 and 787 of 1954 were filed in O.S. No. 2 of 1954 by the State of Madras and Sri Meenakshi Sundareswaral, etc., Devasthanam, respectively The High Court decided all the three appeals on 14th December, 1959, pronouncing a separate judgment in A.S. No.734 of 1954 and disposing of the other two appeals by a common judgment.

The finding that both the *warams* were the subject of the *inam* was reversed by the High Court and O S No 1 of 1954 was decreed. The finding that the *inams* were personal and, therefore, not liable to the resumed was reversed and O S. No 2 of 1954 was ordered to be dismissed except for the modification that the *inam* was held to be of the *melwaram* only, which was the sole decision in the other suit. The High Court repelled all contention about the *ultra vires* nature of section 44-B. The High Court certified *both the* appeals as fit for appeal to this Court and this appeal and c v l Appeal No. 69 of 1965(*Sri M enakshi Sundareswaral, etc , Devasthanam, through its Executive Officer* v. *The Roman Catholic Mission and two others*), have been filed. This appeal relates to O S. No 2 of 1954 and is filed by the Roman Catholic Mission with the State of Madras and the Devasthanam as the respondents. The com-

panion appeal is by the Devasthanam and the answering respondent is the Roman Catholic Mission. This judgment will dispose of the two appeals.

Before we mention the matters in controversy in this appeal, we shall give an outline of the transfers by which the Roman Catholic Mission came to be possessed of the lands. It does not appear to have been seriously questioned at any time that these lands originally belonged to certain Mahomedans as proprietors. It appears, however, (as we shall see presently ) that the land itself was not subjected to any grant but that the *theerva*, that is, the rent paid in money, alone was the subject of the grant. Although the right in respect of the concession in *theerva* was made out in the names of the *Bhattars* who were the *archakas* of the Devasthanam, both the concession as well as the land were subjected to alienations. Even before 12th May, 1861 half of *Melapappapathu* was purchased by one Krishnaswamy Chettiar, son of Andiappa Chettiar and the other half was purchased by him on 1st May, 1861. Similarly, Krishnaswami Chettiar had purchased a half of *Keelapappapathu* from the original proprietors. On 4th January, 1863 one half share in *Melapappapathu* was purchased by one Chockalingam Pillai from Krishnaswami Chettiar. He also purchased one half of Krishnaswamy Chettiar's part of Keelapappapathu, for the benefit of one Muthuramalingam Pillai. In October, 1864 Chockalingam granted a formal release in favour of Muthuramalingam The other half of Keelapappapathu, which continued with the original proprietors was sold by them to Krishnaswamy Chettiar (less one *kani*) on 18th July, 1867. One 25th June, 1870, Muthuramalingam Pillai executed a usufructuary mortgage of a part of the land released in his favour, to one Vairavalingam Pillai, son of Muthuramalingam Pillai. It is not clear whether he was his own son but it is not relevant to inquire. On 14th December, 1871, Muthuramalingam's widow, Adaikalathammal, sold on behalf of her minor son Muthuswami Pillai, half share of Melapappapathu and the quarter share of Keelapappapathu to Krishnaswamy Chettiar The mortgage of 25th June, 1870 was paid off and Krishnaswamy redeemed the property on 11th September, 1872 This left out from Krishnaswamy Chettiar's ownership one Kani, of land which the original proprietors still held. On 17th June, 1872 Krishnaswamy Chettiar purchased that land and in this way he became owner of all the lands comprised in these two appeals. Krishnaswamy executed a release and sale deed in favour of Andiappa Chettiar of all the lands and it appears that Andiappa Chettiar was the beneficiary of the purchases and thus the real owner.

On 20th October, 1894 the Roman Catholic Mission purchased for Rs. 1,500 and Rs. 6,500 the greater part of Melapappapathu. The remaining portion of this block and the Keelapappapathu block was purchased by one Anthonimuthu and when he set up his own title the Mission sued him and obtained a decree in O S. No 45 of 1895 from the Sub-Court, Madurai West. The Roman Catholic Mission has thus been in possession of both the blocks from the last century. We shall now consider the contentions in the two appeals.

The High Court and the District Judge have differed on two aspects of this case. Both the aspects are connected with the nature of the inam in dispute. The first is whether the *inam* was of the *melwaram* alone or comprised both the *warams* and the second is whether the *inam* was a personal *inam* which could not be resumed or one granted for the service of the temple, which could be resumed when there was an alienation and the service was stopped. On the question of the validity of section 44-B of the Madras Hindu Religious Endowments Act, 1927, the District Judge found it unnecessary to express any opinion in view of his decision on the nature of the *inam* which he held to be personal and not liable to resumption, but the High Court considered the question and held the provision to be valid. In these appeals these three points were mainly argued, along with a claim of adverse possession which the Roman Catholic Mission had set up. We shall begin by considering the nature of the *inam*—first from the point of view, whether it comprised both the warams and then from the point of view whether it was a grant to the temple or a grant for an office to be remunerated by the use of land or a grant of land burdened with service. We shall next consider the arguments on the basis of which section 44-B is said to be *ultra vires* and void. Lastly, we shall consider the question of adverse possession.

As there is no document recording the grant of *inam* and its conditions, one has to turn to a number of documents from which the High Court and the Court below have drawn opposite conclusions regarding what was included in the *inams*. There is, of course, no dispute that the *inam* must have comprised the *melwaram* at least. That it must have done in any event Thus the sole question is whether it comprised the *kudiwaram* also. In reaching the conclusion that both *warams* were included, the District Judge took into consideration certified copies of certain leases from the record of an old case O S No. 124 of 1944 of the Court of Subordinate Judge, Madurai. These documents are Exhibits B-4, 5, 6 and A-68, and 69 and 77. Exhibit B-4 is a *karalnama* (agreement) executed for the *fasli* years 1348 and 1349 by which the lessees undertook to hand over 1/3 share of the produce as *melwaram* and to retain 2/3 share as *kudiwaram* from the lands leased out of Keelapappapathu. Exhibit B-5 is another lease for cultivating the whole of *Keelapappapathu nanja* (wet) lands. Exhibit B-6 is a *muchilika* in respect of *nanja* lands in Keelapappapathu by which lessee undertook to pay half produce as *melwaram* and to retain the other half as *kudiwaram* These documents undoubtedly would have thrown light upon the matter but they were not admissible because they were only copies. The originals were not produced at any time nor was any foundation laid for the establishment of the right to give secondary evidence. The High Court rejected them and it was plainly right in so deciding. If we leave these documents out of consideration, the other documents do not show that the *inam* comprised the *kudiwaram* also. Exhibit A-3 is an extract from the village account of Managiri village, Mandakulam Taluk relating to *inams*. It is for the years 1802-1803. The lands are sufficiently identified with the suit lands by the area. The lands were described as *stalathar inam poruppa manyam*, conducted for Meenakshi Sundareshwaral temple. The *poruppu* being a low or quit rent according to the 5th Report, p. 765 we get an indication as to what the *inam* comprise. The account shows that from the total assessment of 96 Pons-o-fanoms and 15 thuddus, the poruppu was only 19 Pons 2 fanoms and 3 thuddus. Again in Exhibit A-5, which is an extract of the *inam* Account of Manigiri village of 1217 *fasli* i.e., five years later, the heading was Inam Enquiry *mauje* (village) Manigiri Now the word Mauje is used in respect of villages in which there are cultivators owning cultivable lands. This has been so held for a long time. See *Venkata Sastrulu* v. *Sitharamadu*[1], per Sadasiva Iyer, J. and *Seethayya* v. *Somayajulu*[2]. In the remarks column, the *poruppu* amount payable is stated and it almost corresponds to the *poruppu* earlier mentioned, and there is a further mention of the service of the temple. The *pattas* Exhibits A-6 to A-8 of the years 1856, 1857 and 1860 also speak of *sourandayam manibam poruppu* which is revenue payable in money at a concession. The *inamdars* did not themselves claim in the Inam enquiry anything more than the *melwaram* rights and in Exhibits A-10 and A-11, which are the *inam* statements (1862) and the Inam Fair Register, dated 25th September, 1863, the *stalathar poruppu manibam* is again mentioned and the Inam were registered in the names of Bhattars as the *sthaniks* of the temple.

The only document in which a contrary not was struck was the *othi* deed (mortgage), Exhibit A-64 of 1876 by which Muthu Meenakshi had mortgaged her *melwaram* interest in half of the *inam* for 20 years in favour of Krishnaswamy Chettiar. Muthu Meenakshiammal was the wife of Vikramapandia Battar the sthaneekam of the Devasthanam. This concerned both Melapappapathu and Keelappapapathu and the mortgagee undertook to pay the *poruppu* In describing the property it was stated that the *melwaram* and *kudiwaram* rights were in the mortgagee's possession. This probably represented the true state of affairs because Krishnaswamy Chettiar was slowly acquiring through the years the lands as well as the *inam* A similar statement was made by Krishnaswamy Chettiar in Exhibit A-42 but it does not advance the case further. It is obvious that Krishnaswamy Chettiar had already acquired not only the *melwaram* but also the *kudiwaram*. Neither document really showed that the *inam* comprised the kudiwaram as well.

1. I L R. (1912) 38 Mad 891 26 M L J. 585

2 I L.R (1929) 52 Mad 453 at 463 56 M L J 730 A I R 1929 P C 115 (P C)

There is no other evidence of the inclusion of *kudiwaram* in the *inam* and the dealings were with *melwaram* which alone the *inamdars* claimed at the *Inam* Enquiry.

Although the matter has been discussed carefully by the High Court, we have re-examined the material and set down here what we consider to be adequate reasons for holding that there is no proof that the *kudiwaram* was the subject of the *inam* All admissible matter points to the conclusion that the *melwaram* alone was the subject of the grant. The appellant in Civil Appeal No 69 of 1965 took us through the two judgments and pressed upon us the view of the trial judge. We have considered the two views and are of opinion that the High Court has reached the right conclusion on the admissible evidence on record. Civil Appeal No. 69 of 1965 must thus fail and this finding by us will be read in the other appeal also.

We shall now consider whether the *inam* was a personal *inam* or for the service of the Devasthanam. The High Court has relied upon a decision of the Madras High Court in *Rasa Kondan* v. *Janaki Ammal*[1], *inams* are of various kinds. They are classified on the basis of concession in land revenue, that is to say, whether the whole of the land revenue is remitted or a part, or whether the land is held subject to a payment of money. Where the whole of the land revenue is remitted the *inam* is known by names such as *Sarva inam*, *Sarva manyam*, *Sarva dumbala* or *darobust inam*. When the right to the soil is not included in the *inam* it is known according to the share which was free such as *Ardha manyam* (half), *chaturbhagam* 1/4, etc. The third kind of *inam* comprised payment of a quit rent called the *poruppu*. The question is whether this *inam* in which only a *poruppu* was payable comprised the right to the soil. In *Venkata Sastrulu* v *Sitaramadu*[2] it was held by the Privy Council that there was no presumption in law that an *inam* grant, even if made to a Brahmin, did not include the *kudiwaram* We have borne this observation in mind but we hold that the evidence in this case points to the fact that the *inam* comprised only the melwaram. It was thus an inam where the land was held subject to payment of an amount as quit rent. It was granted to the *archakas* and was recorded in their name. That they alienated the lands is without any doubt and the question is whether the *inam* could be resumed or not Section 44-B inserted by the Madras Hindu Religious Endowment (Amendment) Act, 1934 (Madras Act XI of 1934) in the parent Act II of 1927 and further amended by the Amendment Act X of 1946 reads :

" 44-B. (1) Any exchange, gift, sale or mortgage, and any lease for a term exceeding five years, of the whole or any portion of any inam granted for the support or maintenance of a math or temple or for the performance of a charity or service connected therewith and made, confirmed or recognised by the British Government, shall be null and void.

*Explanation.*— * * * * *

(2) (*a*) The Collector may, on his own motion, or in the application of the trustee of the math of temple or of the Assistant Commissioner or of the Board or of any person having interest in the math or temple who has obtained the consent of such trustee, Assistant Commissioner or Board by order resume the whole or any part of any such inam, on one or more of the following grounds, namely .—

(i) that the holder of such inam or part has made an exchange, gift, sale or mortgage of the same or any portion thereof or has granted a lease of the same or any portion thereof for a term exceeding five years, or,

(ii) that the holder of such inam or part has failed to perform or make the necessary arrangements for performing in accordance with the custom or usage of such math or temple, the charity or service for performing which the *inam* had been made,confirmed or recognized by the British Government, or any part of the said charity or service, as the case may be, or

(iii) that the math or temple has ceased to exist or the charity or service in question has in any way become impossible of performance.

When passing an order under this clause, the Collector shall determine whether such inam or the inam comprising such part, as the case may be, is a grant of both melvaram and the Kudivaram, or only of the melvaram.

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1. (1950) 2 M L J 177 I L R (1951) Mad 342 A.I R. 1951 Mad 333

2. I L.R. (1912) 38 Mad. 891 : 26 M.L J. 585

(*f*) Where any inam or part of an inam is resumed under this section, the Collector or the District Collector, as the case may be, shall by order, re-grant such inam or part—

(i) as an endowment to the math or temple concerned, or

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* * * * *

* * * * * "

Sub-section (1) of section 44-B was the subject of interpretation in *P. V. Bheemsena Rao* v. *Sirigiri Peddayella Reddi and others*[1]. The question then was whether section 44-B (1) covered a grant of land burdened with service as against a grant for an office to be remunerated by the use of land but resumable when the service was not performed. In dealing with these two distinct aspects of an *inam* grant, Gajendragadkar, J. (as he then was) and Wanchoo, J., point out that the former is not a case of a service grant proper and such a grant can only be resumed if conditions of the grant contemplate a resumption when the service is not performed. The other is a proper service *inam* and unless service is p rformed resumption is inevitable They also point out that prior to the enactment of section 44-B the *inams* were governed by the Board's Standing Orders: rule 54. That laid a duty on Revenue Officers to see that *inams* confirmed by the Inam Commissioner as being for the service of some religious or charitable institution were not enjoyed without the performance of service. Grants were liable to be resumed when the whole or part of the land granted had been alienated or lost. Provision was, however, made to deal with such cases in two ways. Either there was resumption or the grantee was left in possession and the full assessment being imposed on him, the difference was made available to the particular charity or institution for the service of which the grant was made. Therefore, in the case of personal *inams* burdened with service, when the service was not being performed, whether there was an alienation or not, the full assessment being demanded, the personal portion was left to the grantee but the concessional portion was given to the charity concerned.

After the enactment of section 44-B the Boards Standing Orders, Rule 54 was amended and *inams* for religious and charitable purposes were classified

(i) *inams* granted for the performance of a charity or service connected with a Hindu math or temple; and

(ii) *inams* not falling under class (i).

The first of the two kinds were governed by the provisions of the Madras Hindu Religious Endowments Act and the second by the Board's Standing Orders, Rule 54. Taking this history into account it is pointed out that section 44-B (1), in spite of the width of its language is only open to a restricted interpretation and includes in resumable *inams* those in which the whole of the income or a very great part is required for the service and not large personal *inams* with a small or slight service. On the other hand grant of land made to an office-holder to remunerate him for service is always resumable if he ceases to hold office or to perform service.

The rival contentions in this case may now be considered The Roman Catholic Mission submits that these are personal *inams* and they do not come within section 44-B This submission was accepted by the District Judge According to him, the *inam* was made to the ancestor of the persons named in the Inam Fair Register, subject to the obligation to perform service in the temple. The *inam* is thus held not to be attached to any office, *archaka* or other, nor is the income remuneration for that office. It is urged that such an *inam* is alienable, and if the service continues, the alienee cannot be disturbed and can enjoy the *inam*. The High Court accepted the contention of the Devasthanam that the *inam* was granted for the office of the *archakas* and for service as such. In other words the *inam* is said to be attached to the office and thus incapable of alienation and if alienated liable to resumption.

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1. (1961) 2 S.C.J 671 (1961) 2 M.L.J. (S.C.) 190 . (1961) 2 An.W.R (S.C.) 190 : (1962) 1 S.C.R. 339 . A.I.R. 1961 S.C. 1350.

In deciding which it is, certain documents, throw a flood of light. In Exhibit A-3 to which we have already referred, this *inam* is called *devadayam inam* and again as *stalathar inam poruppu manyam* ' conducted for Meenakshi Sundareshwaral Temple, *thastic devasthanam* ' The *inam* is entered in the name of Bhattars. The word *devadayam* ordinarily is used in revenue records to describe lands attached to a temple and in the dictionaries the meaning is 'lands or allowances for the support of a temple.' The expression *sthalathar poruppu manyam* or shortly *sthala manyam* means land held at a low or quit rent. The word *poruppu* also means quit rent. Thus this document shows that the Bhattars were granted these lands in *inam* for the performance of service of the temple but not granted as *inam* personal to the grantee. The High Court rightly pointed out that the description in the same document ' Shanmugasundra Bhattar Mritunjaya Bhattar inam ' was merely a description of the *inam* with reference to the *inamdars*, but could not in the circumstances mean that the *inam* was their personal *inam*.

Further Exhibit A-11, the Inam Fair Register of 1863, does not mention the name of the original grantee which it would have if the grant was personal. The names of the two Bhattars are entered but as *sthanikams* of Pagoda Meenakshi Sundareshwaral and the *inam* is described as Devadayam for the *archakal* service, that is to say, of *puja parichakaram* in the temple and it is stated that the Inam Commissioner confirmed the *inam*

Now in a series of cases, the Inam Enquiry has been held by the Judicial Committee to be a landmark. In *Arunachellam Chetti and others* v. *Venkatachalapathi Guruswamigal*[1], the utmost importance was attached to the Inam Fair Register, the preparation of which was described as a great act of State. In *Narayan Bhagwantrao Gosavi Balajiwale* v *Gopal Vinayak Gosavi*[2], this Court held, accepting the finding of the Inam Commission in the absence of other evidence, that the grant was to a Devasthan and constituted a Devasthan Inam.

Mr Ramachandra Aiyer attempted to prove to us that the expression ' act of state ' in the Privy Council judgment was a misuse of the term and cited some cases where the act of state has been discussed. We do not find it necessary to refer to them. The term act of state does not always mean a sovereign act against an alien which is neither grounded in law nor does it pretend to be so The term means more than that because it has many meanings. In the *State of Saurashtra* v. *Memon Haji Ismail Haji*[3], other meanings of this term are given. Here it indicates an act in respect of which there was an official declaration. The Inam Fair Register incorporated an official declaration which was the result of detailed inquiries. All evidence collected in respect of each *inam* was carefully sifted and considered before any conclusion was reached or declared. In the absence of positive and proper evidence to the contrary such declaration must possess supreme importance.

It is significant that the Roman Catholic Mission in the plaint as it was originally filed had said that the office of the *archaka* was renumerated by the income of lands in dispute and by the income from other sources. However, when the decision in *sub nom. P.V. Bheemsena Rao* v. *Yella Reddi*[4], of the High Court of Madras was reported, it pleaded by an amendment that the *inam* was a personal *inam*. As the High Court in the judgment under appeal points out, there was litigation between the Bhattars and the Roman Catholic Mission and the evidence we have discussed, must have been known to the Mission when the original plaint was filed. The fact that their plea was that this was an *inam* for remunerating the office of the *archakas* represented a true reading of these documents. The Inam Fair Register speaks of the *inam* as *Devadayam* and reads it as permanent. If the *inam* was to a Brahmin personally it would have been shown as " *Brahmadayam* " and " hereditory. "

Finally in Exhibit A-10, which is a statement of Muthumeenakshiammal who was in enjoyment of the *inam* in 1863, it is stated:

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1. I.R (1919) 46 I A. 204 I L R 43 Mad 253 : 37 M L J 460

2. (1960) S.C J 263 : (1960) 1 S.C.R 773: A.I R. 1960 S.C. 100.

3. (1960) S.C.J. 394 · (1960) 1 S C R. 537 543 · A.I R 1959 S.C 1383

4. (1954) 1 M L J. 384 I.L.R. (1955) Mad 45 A.I.R. 1954 Mad. 795.

"Particulars as to how the inam was obtained and the abstract of the deeds.

(7)
Nanjakani 39
During the time of our
predecessors the said

Manibam was allotted by the previous Government for sthalathar inam of Meenakshi Sundareswaral and just as our predecessors enjoyed, we also in the aforesaid manibam, I Muthu Meenakshi Ammal half share, I Ponnammal 1/4th share, we Kalyana Battar and Chinna Subba Battar 1/8th share and we Villu Battar alias Shunmuga Sundara Battar 1/8th share, we are in enjoyment of the aforesaid Maniba lands in the aforesaid manner and we are paying the poruppu manyam due in respect thereof as per our proportionate share and we are also remaining in enjoyment of the said manibams as our predecessors enjoyed. We are doing archakam (pooja) and cooking in the aforesaid temple"

This clearly shows that the *inam* was always considered as remuneration for *archaka* service of the temple and on its alienation it is liable to resumption under section 44-B. Even before the incorporation of section 44-B such an *inam* could have been resumed by Government, under Standing Order of the Board of Revenue Rule 54 (1)(see *Anjaneyalu* v. *Sri Venugopala Rice Mill Ltd.*[1]) Mr. Ramchandra Aiyer even attempted to question the correctness of this case, which has been followed consistently. The finding of the learned District Judge, Madurai that this was a personal *inam* to an individual was erroneous and the High Court was right in reversing it.

Mr. Ramachandra Aiyer next contends that section 44-B was void when the Legislature purported to enact it, and, therefore, no action could be taken under it This argument is many faceted and often it is obscure Shortly stated, the argument is this . The *inam* was confirmed on 25th September, 1863, under title deed 1354 by the Inam Commissioner. The alienations of the rights, whatever they be, were before that date Prior to the Inam Commission there was no prohibition and the confirmation could not affect prior alienations As the *inam* deeds were validated by an Act of the British Parliament (32 and 33 Vict. c. 29) the right to forfeit the *inam* concession or to resume it could be exercised by the Crown only as the *inam* became a contract between the Secretary of State for India and the inam holder Section 44-B is said to be void because it conflicts with this position and enabled the Revenue Officers to order resumption. The resumption or forfeiture itself was said to be ineffective without the order either of the Governor-General or Governor in exercise of his indiv dual judgment and also because the right to resume the *inam* was said to be extinguished by prescription. The resumption was characterised as a forfeiture and was said to be void under section 299 of the Government of India Act, 1935 and Articles 31 and 296 of the Constitution. Madras Hindu Religious and Charitable Endowments Act (XIX of 1951) which by section 35, re-enacts section 44-B was further said to be void as, it was said, it seeks to protect only Hindu religious institutions and not those belonging to other religions. The power of the Provincial Legislature to enact section 44-B in 1934 or 1946 was also challenged under the Government of India Act and the Government of India Act, 1935, respectively.

The District Judge did not consider any of these arguments except the last, because he decided the issue of resumption against the Devasthanam and the State Government. The District Judge decided that the section was validly enacted by the Provincial Legislature. The District Judge, however, mentioned in the judgment all the arguments which were raised before him and they were the arguments which we have set down above. However, in the High Court most of these arguments do not appear to have been advanced because the High Court judgment is silent about them. We intimated Mr. Ramachandra Aiyer that we would not allow any argument to be advanced which the High Court was not invited to consider. In the High Court the validity of section 44-B of the Madras Act and section 35 of the Act of 1951 was considered from the point of view of the powers of the Provincial Legislature when the former was enacted and from the angle of the Constitu-

1. (1922) 42 M L J. 477· (1922) I L R 45 Mad. 620 (F.F.) at 624: A I.R. 1922 Mad. 197.

tion in respect of both. We shall consider these arguments mainly from the same two stand points

The powers of the Provincial Legislatures under the Government of India Act were determined under the Devolution Rules made by the Governor-General in Council under sections 45-A and 129-A of the Government of India Act. By these rules a classification of subjects was made for the purpose of distinguishing the functions of the local Governments and local Legislatures of Governors' provinces from the functions of the Governor-General in Council and the Indian Legislature. The Devolution Rules set out in two lists the subjects so classified and any matter in the list of provincial subjects set out in Part II of Schedule I was excluded from any Central subject. Under rule 4 of these rules, if any doubt arose as to whether a particular matter did or did not relate to a provincial subject, the Governor General in Council was to decide whether the matter did or did not so relate and his decision was final

At this distance of time, it is somewhat inept for a Court, without a proper inquiry, to decide whether the powers of the Provincial Legislature did or did not extend to the making of section 44-B For aught we know, this identical question might have been raised and the decision of the Governor-General in Council obtained. That would be end of the matter. No one seems to have challenged the section although numerous *inams* were resumed under that section. However, considering the matter in principle we do not feel any doubt about the competence of the Provincial Legislature As the District Judge and the High Court have rightly pointed out, the powers of the Provincial Legislatures extended over land tenures, land revenue administration and religious and charitable endowments A concatenation of these several powers must obviously furnish adequate scope for undertaking the most comprehensive legislation on the subject of *inams* in general and *inams* connected with religious and charitable endowments in particular. Section 44-B was thus fully within the competence of the Provincial Legislature.

The next question which was considered by the High Court was whether resuming and regranting the *inam* to a Hindu temple, offended, the Constitution. The High Court did not accept this submission. It is obvious that by the transfer of the *inam* the temple was deprived of a benefit and the transferee had not right to hold that benefit What was done was to restore to the temple what it had lost and this was not putting a denominational religious institution at an advantage.

Once we hold that the Provincial Legislature had competence to enact the impugned section, it would follow that the section would be sustained by section 292 of the Government of India Act, 1935. Indeed, the power of the Provincial Legislature under the Act of 1935 was no whit less than that of the Legislature which enacted the section. Any amendment of the section in 1946 would have clear authority even under the Act of 1935 And the same may be said of the Madras Hindu Religious and Charitable Endowments Act, 1951 *vis-a-vis* the Constitution.

The theory that contracts between the Secretary of State for India and the *inam* holders came into existence after the passing of 32 and 33 Vict c 29 and that this took the matter out of the powers conferred by the Devolution Rules upon the Provincial Legislatures, is equally fallacious What had really happened was this. In 1858, when the Government of the East India Company, which held the territories in trust from the Crown, came to an end, the British Parliament passed " An Act for the better Government of India ". We are not concerned with its provisions A year later another Act was passed to amend the Act of 1858 It provided that any deep, contract or other instrument for the purpose of disposal of real estate in India, vested in Her Majesty under the Act of 1858 must be expressed to be executed as on behalf of the Secretary of State for India or by order of the Governor-General in Council or the Governor of Fort St George or of Bombay in Council. Although this statute was there, the title deeds which were issued by the Inam Commissioner were not expressed to be executed by order of the Governor in Council and purported to have been executed on behalf of the Governor in Council instead of on behalf of the Secretary of State for India in Council. This created a doubt about the validity

of the title created under them. By the enactment of 32 and 33 Vict. c 29 the title deeds for *inam* lands were validated. They were to be read and to have the same effect as if they were executed by order of the Governor in Council and on behalf of the Secretary of State for India in Council. In this way the flaw in the numerous grants was removed without having to reissue fresh title deeds.

This legislation did not create a contract. It only validated the old title deeds and no more. To read into the grants by which *inams* were created, a contract which was inviolable except by resumption by the Crown is to read into the Acts of British Parliament something which is not there. Like any other grant which is resumable on breach of its conditions, these *inams* were resumable according to their terms and conditions. There was nothing in the *inam* title-deeds or these statutes which inhibited the Provincial Legislature from enacting section 44-B under its undoubted powers or the Collector from resuming the *inam* on breach of its conditions under the power granted by the section.

The other arguments on the subject of the validity of section 44-B need not detain us. They proceed on obliterating the difference between resumption of an *inam* for breach of its terms and forfeiture which is a kind of punishment annexed by law to some illegal act or negligence, in the owner or possessor of land. We are not here concerned with forfeiture but with the resumption of a concession granted by Government, which is occasioned by the alienation of the concession to a stranger. Any argument based on forfeiture is entirely out of place. Similarly, the arguments based on *bona vacantia* or deprivation of property sufficiently indicated by the reliance of the articles of the Constitution mentioned earlier by us cannot help partly because they are irrelevant and mainly because no such arguments appear to have been advanced in the High Court. We accordingly reject the contention that section 44-B or the resumption under it were invalid.

There remains only the question of adverse possession. In *Boddupalli Jaganna-dham and another* v. *Secretary of State*[1], it was held that there is no period of limitation prescribed by any law within which alone Government should exercise its prerogative of imposing assessment on land liable to be assessed with public revenue. This case was followed in *Subramaniam Chettiar* v. *Secretary of State*[2]. As the resumption was of the *melwaram* only these rulings apply. Mr. Ramachandra Aiyer admitted that he had no authority to the contrary. This point has no force. This appeal (Civil Appeal No. 389 of 1964) must also fail

The two appeals will accordingly be dismissed with costs. There will be a right to set off the costs.

V.K. ——— *Appeals dismissed.*

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction)

PRESENT :—P. B GAJENDRAGADKAR, *Chief Justice*, K. N WANCHOO, M. HIDAYATULLAH, V RAMASWAMI AND P. SATYANARAYANA RAJU, JJ.

Saravanabhavan and Govindaswamy .. *Appellants**

*v*

State of Madras .. *Respondent.*

*Constitution of India* (1950), *Article* 136—*Criminal appeal by Special Leave—Interference with decision of lower Courts—Principles observed for exercise of jurisdiction*

Per *Hidayatulla, J* (on behalf of majority) —In a criminal appeal by Special Leave the Supreme Court will not reassess the evidence at large, particularly when it has been concurrently accepted by the High Court and the Court or Courts below. The Supreme Court does not form a fresh opinion as to the innocence or the guilt of the accused It accepts the appraisal of the evidence in the High Court and the Courts below Therefore, before the Supreme Court interferes something more must be shown

1. I L R. (1903) 27 Mad. 16. 2 (1916) 23 M L.J 392.

*Crl.A No 129 of 1965 16th December, 1965.

such as that there has been in the trial a violation of the principles of natural justice or a deprivation of the rights of the accused or a misreading of vital evidence or an improper reception or rejection of evidence, which if discarded or received would leave the conviction unsupportable, or that the Court or Courts have committed an error of law or of the forms of legal process or procedure by which justice itself has failed In the instant case, there is no such infirmity in accepting the approver's evidence , the High Court and the Sessions Judge were fully alive to the law of approver evidence and acted accordingly The appeal has to be dismissed.

Per *Wanchoo* and *Ramaswami, JJ* —In the instant case the High Court does not seem to have addressed itself first to the question whether the evidence of the approver is credible in itself and can be relied upon. For that purpose the approver's evidence has to be scrutinised as a whole along with other evidence and this the High Court does not seem to have done The story of the approver appears to us to be incredible in itself and there is hardly any evidence to connect the approver with the crime, besides of course his own statement. The appeal must be allowed and the conviction set aside.

Appeal by Special Leave from the Judgment and Order dated the 10th February, 1965 of the Madras High Court in Criminal Appeals Nos. 699 and 701 of 1962 and Referred Trial No. 96 of 1964.

*S. Mohan Kumaramangalam*, Senior Advocate, (*G. D. Gupta* and *S Balakrishnan*, Advocates) and (*M K. Ramamurthi, R. K. Garg, S. C. Agarwal* and *D. P. Singh* Advocates of *M/s. Ramamurthi & Co.*, with him), for Appellants.

*Sarjoo Prasad*, Senior Advocate, (*A V. Rangam*, Advocate, with him), for Respondent.

The Court delivered the following Judgments:

*Hidayatullah, J.* (on behalf of *Gajendragadkar, C J.*, himself and *Satyanarayana Raju, J*)—This is an appeal by Special Leave against the judgment of the High Court of Madras dated 10th February, 1965, in Criminal Appeals Nos 699 and 701 of 1964. The appellants are two condemned prisoners under sentence of death passed on them by the Sessions Judge, Coimbatore and confirmed by the High Court. They have been convicted under sections 302/34 and 449 of the Indian Penal Code, on being found guilty of the murders of one Peramia Goundar, his concubine Swarnam and Swarnam's mother Meenakshi Ammal at Kullaipalayam on the night of 11th January, 1964.

The scene of the offence was the residential house of Peramia Goundar on the Dharmapuram-Kangeyam Road. Peramia Goundar was aged 65 years at the time of his death. He lost his wife 15 years ago after she had borne him four daughters All the daughters had been married and three were living at the time of Peramia's death The daughter, who died earlier, was married to one Marimuthu Gounder and a daughter Govindammal was born of that union. Govindammal was married to Saravanabhavan (accused 1). Peramia Goundar was the youngest of three brothers. They had separated and divided the properties between them, The eldest brother was Krishnaswami Goundar and next was Padathi Goundar. Krishnaswami's son was one Govindaswamy who had three sons, the eldest being the appellant Saravanabhavan. Padathi Goundar has three sons and his youngest son is one Sennimalai Goundar.

Peramia Goundar was a rich man and was in possession of lands and cash. Four or five years before his death, he kept Swarnam as his concubine. Swarnam was living in his house and had brought her mother Meenakshi Ammal to live with her Swarnam had a brother, Balasubramaniam (P W 20) Peramia Goundar had taken a great interest in Balasubramaniam and had put him in the timber depot of his son-in-law Marimuthu to learn the trade and had given Marimuthu a loan of Rs. 5,000. Peramia Goundar had executed a will on 26th March, 1947 (Exhibit P-8) by which he had bequeathed his properties in favour of his three daughters and Sennimalai Goundar He had gifted already 40 acres of land to Sennimalai Goundar. Peramia revoked the first will and executed another registered will Exhibit P-9 on 19th September, 1960. Under this will, the legatees were the three daughters, Swarnam, Saravanabhavan (appellant) and his wife

Govindammal. Peramia took back the lands he had given to Sennimalai Goundar and recovered the loan from Marimuthu. He then began arranging for a timber depot for Swarnam's brother. Swarnam tried to arrange a marriage of her brother with Govindammal's younger sister but could not bring it off as Saravanabhavan was against this marriage. After this, Swarnam induced Peramia to send away Saravanabhavan and his wife from his house Swarnam next arranged a match with the daughter of one Muthu Goundar but Saravanabhavan told Muthu Goundar that Balasubramaniam was a spend-thrift and came from a bad family This broke off the match and Muthu Goundar told Peramia what Saravanabhavan had told him. When this match was broken off, Peramia was angry and he began to say that he would revoke the will in which Saravanabhavan and Govindammal were legatees. There is evidence to show that on the date of the occurrence Peramia scolded Saravanabhavan and told him that he (Peramia) would revoke the will. He went to Dharampuram and told Balasubramaniam what had taken place between him and Saravanabhavan. Peramia's statement was, of course, provable as a transaction resulting in his death. The same night, these three muders took place.

On 12th January, 1964, Palaniammal (P.W. 9) a domestic servant of Peramia went to his residence as usual in the morning. She found the western door of the house bolted from inside and tapped on the door ; there was no answer. She then went to the northern door and found it ajar. Entering the house, she got the shock of her life when she discovered the three inmates butchered and lying in their blood. She ran away and informed Kangaya Goundar (P.W. 10) about it. The murder being thus discovered, the usual reports and other proceedings followed. The police arrested accused 1 (Saravanabhavan), accused 3 (Govindaswamy), accused 2 (Krishnaswamy since acquitted) and P W 2 (Sukran *alias* Sankara Kudumbanna) one after the other and in that order. Saravanabhavan made a statement. of which the admissible portion is Exhibit P-24, in the presence of Dorairaj, Village Munsiff (P.W. 21) and Velayudhan Nair, Sub-Inspector of Police (P W 23). He took the police to the house of Muthuswamy (P W. 6) and on statements made by Muthuswamy, ashes of cloth (M.O 19) were seized, which were stated by Muthuswamy to be the veshti and under-wear of Saravanabhavan burnt by the witness. Saravanabhavan took the police to his house from where he produced M.Os. 9 and 19 which Muthuswami stated were loaned to Saravanabhavan as Saravanabhavan's own clothes were stained with blood.

Govindaswamy accused 3 also made a statement to the police (Exhibit 25) and offered to produce a *veecharuval* (M.O. 3) which was later dug out from a pit. It may be mentioned here that at the house of Peramia was found a chimney (M.O. 5) which bore some finger prints and they were identified by Ramakrishnan, Finger-print Expert (P.W. 13) to be those of Govindaswamy. Govindaswamy was wearing at the time of his arrest an under-wear and vesthi which were seized under seizure memo. P. 26 from him. They were item 20 in the Chemical Examiner's Report and the *aruval* was item No. 21. The clothes were subsequently found to be stained with human blood but the blood on the *aruval* was disintegrated and the source could not be detected.

As there was no eye-witness to the offence, pardon was tendered to Sukran (P.W. 2) and he was examined as an approver in the case. The High Court and the Sessions Judge accepted his testimony and found corroboration for it generally and in respect of each of the two convicted accused with whom we are concerned. The conviction and the sentence passed on each of the accused have thus been reached concurrently. In this appeal, we were invited to reverse the finding on the ground that the approver's testimony was not *per se* credible and that there was neither general corroboration of his testimony nor corroboration in respect of either of the appellants.

This is an appeal under Article 136 of the Constitution and we shall first state what this Court will ordinarily consider in such an appeal. It is not to be forgotten that this Court's ordinary appellate jurisdiction in criminal cases is to the extent

laid down in Article 134 of the Constitution. Some of the appeals in that article are available as of right and others lie if a special certificate is granted by the High Court. This appeal belongs to neither class. It is not as of right and no special certificate has been granted by the High Court. There is in our jurisdiction no "sacred right of appeal" as the French Canadian law assumes (See *Mayor etc. of Montreal* v. *Brown and another*)[1]. Once a decision is given by the High Court, that is final unless an appeal is allowed by Special Leave of this Court. No doubt this Court has granted Special Leave to the appellants but the question is one of the principles which this Court will ordinarily follow in such an appeal. It has been ruled in many cases before that this Court will not reassess the evidence at large, particularly when it has been concurrently accepted by the High Court and the Court or Courts below. In other words this Court does not form a fresh opinion as to the innocence or the guilt of the accused. It accepts the appraisal of the evidence in the High Court and the Courts or Court below. Therefore, before this Court interferes something more must be showed, such as: that there has been in the trial a violation of the principles of natural justice or a depreciation of the rights of the accused or a misreading of vital evidence or an improper reception or rejection of evidence which, if discarded or received, would leave the conviction unsupportable or that the Court or Courts have committed an error of law or of the forms of legal process or procedure by which justice itself has failed. We have, in approaching this case, borne these principles in mind. They are the principles for the exercise of jurisdiction in criminal cases, which this Court brings before itself by a grant of Special Leave.

Mr. Mohan Kumaramangalam in dealing with the appeal attacks the evidence of the approver and we shall now deal briefly with his criticisms on the strength of which he seeks to get the evidence of the approver excluded from consideration. It is true that if he succeeds in this, the case against the two appellants must fail, because there is nothing in the rest of the evidence to connect them with the murder except the discoveries against them. Mr. Mohan Kumaramangalam contends that the approver is a disreputable person here, "K.D." (known desperado) and his evidence must not be received implicitly. This aspect of the case was considered by the Sessions Judge but not the High Court. As the Sessions Judge rightly remarked, only such a character would be used as a hired assassin but being an approver, his testimony in any event requires corroboration before it can be accepted. The antecedents of the approver do not really make him either better or worse. His evidence can only be accepted on its own merits and with sufficient corroboration. We have been taken through his evidence and we are satisfied that the High Court was right in believing it, and there is nothing to show that it can be excluded from consideration. A few points were made about his testimony and we will briefly advert to them although they have been considered already, either in the judgment under appeal or in the judgment of the Sessions Judge. The first is the discrepancy between his evidence and that of P.W. 21—the Village Munsiff, on the subject of the lights in the house of Peramia. The approver in his deposition stated that electrical light was burning in the room where the murders took place and he switched off the light. The Village Munsiff stated in cross-examination that there was no electricity in the village Kullapalayam. Mr. Mohan Kumaramangalam contends that this demonstrates that the approver was imagining things and that he was in fact not present in the house or at the scene of murder. There is no doubt that this contradiction is there, although it is not quite clear whether the house was connected to electric energy or not. The learned Sessions Judge or the High Court could have easily cleared the doubt by taking some more evidence, and they have held that this was a mistake. We have considerable doubt in the matter. However, stray sentence in the deposition of the Village Munsiff, even if it contradicts the approver, does not necessarily lead to the conclusion that the approver was not present. The approver's testimony has received corroboration at various points. The first and the foremost is the fact that he was arrested last of all and thus could not have put the police on a wrong scent. The police had already arrested the

1. (1876) L.R. 2 A.C. 168 at 184.

three accused in the case and had obtained from them statements which led to certain discoveries. The approver in naming the accused was stating something, a part of which was already known to the police. It is contended in the alternative that the approver must have been coached to support the prosecution case. This cannot be accepted, because the approver himself made statements which led to the discovery of blood-stained clothes and articles from places in which they were hidden in such manner that the hiding place could only be known to him and none else. These discoveries connect the approver with the occurrence. Further his statement that accused 3 Govindaswamy had brought the chimney (M.O. 5) after the light in the room was extinguished, is corroborated by the discovery of the finger-prints of Govindaswamy on the chimney. In his examination, Govindaswamy did not deny that they were his finger-prints and gave the explanation that he used to visit the place of Peramia and might have left his prints then on the chimney. This explanation was rejected by the High Court and the Sessions Judge and we do not see any reason to accept it. It, therefore, follows that the approver was in a position to state a fact about Govindaswamy which was corroborated and makes the probability of his presence at the scene of occurrence, into a certainty.

It is next contended that the approver had minimised his own part, that he was a hired assassin and should have played the leading role, but he says that he only struck one blow and that too ineffective. It is argued that he should not be believed. We accept that the approver slurred over his own share in the affair as, in fact, most of the approvers do. Approvers do not want to involve themselves too deeply in the offence even though they depose under the terms of a pardon. The question always is whether on the statements they would be held guilty or not. The approver admits his participation in the guilt sufficient for his conviction. It is obvious that his statement was not self-exculpatory. As his statement must be received with caution, the High Court and the Sessions Judge, being alive to the need of caution, looked for adequate corroboration before accepting his testimony. They have critically examined his evidence before holding that his version is credible. They committed no error either of law or of fact in accepting the testimony of the approver and in view of the principles to which we have already adverted earlier, we do not feel called upon to reject the testimony of the approver.

The evidence corroborating the presence of each of the two appellants is ample. In regard to Saravanabhavan, there is the evidence of motive which is strong and could not have been a concoction. The two wills executed by Peramia were produced in the case and were proved by P.W. 11 the scribe. They clearly show that Saravanabhavan and his wife were to benefit under the second will. There is ample proof that Peramia was greatly influenced by Swarnam and that he was trying to set up her brother in business. It is also amply proved that Swarnam's brother Balasubramaniam was about to be married to Muthu Goundar's daughter but the match was spoiled by Saravanabhavan. There is evidence to show that Peramia took considerable offence and he threatened to revoke the will under which Saravanabhavan and his wife were beneficiaries. This establishes a very strong motive on the part of Saravanabhavan to do away with Peramia before the latter could revoke the will. Indeed, Mr. Mohan Kumaramangalam did not deny the existence of this motive. Many murders, in the history of crime, have been committed by beneficiaries under wills who have so acted because of an apprehension that the will in question might be revoked. This is just another case of that kind. Saravanabhavan thus had a motive to commit the murder. Then there is the evidence of P.W. 6 Muthuswamy whose veshti and under-wear Saravanabhavan had borrowed so that he could get rid of his blood-stained clothes. It is contended that P.W. 6 must be regarded as an accomplice because he burnt the blood-stained veshti and under-wear of Saravanabhavan and thus caused disappearance of the evidence of his guilt. P.W. 6 was not an accomplice in the act of murder; at best, he can be described in the words of English law as an accessory after the fact. He was, if he had a guilty intention, an offender or an abetter under section 201 of the Indian Penal Code. He was young and inexperienced being only 20 years of age. His act was probably an unthinking act, and he seemed not to realise the

gravity of it till his father scolded him for having done it. His statement that he burnt the clothes was corroborated by the discovery of ashes and charred pieces of cloth from the place of burning He also stated that Sarvanabhavan made an extra-judicial confession before him and his statement that he loaned the banian and veshti was true, because the veshti and banian were found from Saravanabhavan's house. In view of the motive, the statements and the discovery of the two items of cloth and the statement of P.W. 6, the approver's testimony in respect of Saravanabhavan becomes acceptable.

In respect of the other appellant, Govindaswamy, his presence is almost certified by the discovery of his admitted finger-prints upon the chimney in the house of Peramia, and the discovery of the blood-stained garments and *aruval*. The evidence of the approver against him is corroborated. It is obvious that these two appellants were rightly convicted.

Although we have reassessed the evidence in part, we may say that the Sessions Judge and the High Court were fully alive to the law relating to approver testimony. They first examined the approver's statement to find whether it was *per se* credible or not They concurrently found that the statement made by him, judged of in the light of probabilities and the corroborating evidence was credible. They next looked for general corroboration, they found it from the various discoveries which he made himself and the discoveries made by others named by him. They next considered whether there was corroboration in respect of the participation in the guilt of the appellants named by him as his co-murderers They found this corroboration also The evidence was scanned properly from these three points of view and on reading the evidence we find nothing on which we can say that there is any error of any of the kinds mentioned by us earlier which calls for interference. The appeal therefore fails and is dismissed

*Wanchoo, J.* (on behalf of himself and *Ramaswami, J.*).—We regret we are unable to agree.

This is an appeal by Special Leave against the judgment of the Madras High Court It arises out of the murders of three persons, namely, Peramia Gounder, his concubine Swarnam and her mother Meenakshi on the night between 11th and 12th January, 1964 at Kullaipalayam The murders were discovered at about 7 A.M. on 12th January, 1964, when a maid-servant went as usual to the house of Peramia Goundar. She found the three persons lying dead inside the house with bleeding injuries She reported the matter to Kangaya Goundar, who went to the spot and saw the three dead bodies. Kangaya Goundar then reported what he had seen to the Village Munsif at 8 A.M. the same day. In this report Kangaya Goundar said that it was not known who had committed the murders

The prosecution case is that Peramia Goundar was a well-to-do man. He had four daughters all of whom had been married His wife had died ten years before the incident. For the last four years he had been living with Swarnam who became his concubine. Swarnam's mother Meenakshi also lived with her. Peramia Goundar had made a will in 1947 by which he devised his properties in favour of three of his daughters and a nephew Appellant Saravanabhavan (hereinafter referred to as Sarvan) was married to one of the grand-daughters of Peramia Goundar a few months before the incident After this marriage Sarvan and his wife lived for sometime with Peramia Goundar, though at the time when the incident took place they were living separately. The prosecution case is that Sarvan and his wife resented Peramia Goundar living with his concubine and this led to misunderstandings between them. It was also the prosecution case that on 11th January, 1964, there was a quarrel between Peramia Goundar and Sarvan. It may be mentioned that Peramia Goundar made another will in September, 1960 in place of the earlier will of 1947 and had left some property to Sarvan who was also the grandson of Peramia Goundar's brother. It is said that when the quarrel took place on 11th January, 1964. Peramia Goundar threatened to change his will. Sarvan wanted to avert this change and that was the motive for the murders which took place the same night.

The main evidence in this case consists of the statement of Sukran, who has turned approver. The story given by him was this. In order to do away with Peramia Goundar, Sarvan had hatched a conspiracy with Krishnaswami, who was one of the accused but has been acquitted by the High Court, to murder Peramia Goundar. In that connection three days before the incident, Sarvan and Krishnaswami met Sukran and asked for his help in committing the murder and offered to give him Rs. 1,000 and six acres of land on lease. Govindaswamy appellant is also said to be a friend of Sarvan and joined the conspiracy. So the same night at about 9 P.M. Sukran met Sarvan, Krishnaswami and Govindaswamy and they left for Kullaipalayam to commit the murder. None of them had arms. After reaching Kullaipalayam, they could not find any sticks which they intended to use for committing the murders and so the plan was postponed and Sarvan said that he would collect knives and sticks and they would commit the murder two or three days later. Sarvan asked Sukran to bring a *bichuwa* knife and a *veechu-aruval* when sent for and that he would also collect the necessary knives. Sukran was then sent for two or three days later through Thangana. He came on the night of the incident with a *bichuwa* knife and a *veechu-aruval*. Sarvan also got two *aruvals* and they all came to Kullaipalayam accompanied by Thangana. After reaching Kullaipalayam, Sarvan went to purchase cigarettes and brought some. He also went to the house of Karupanna Nadar and brought two *koduvals* (choppers) from there. They then went to the house of Peramia Goundar. Sarvan and Krishnaswami got over the wall of the house with the assistance of Sukran and Thangana and jumped inside and then opened the door. At that stage Thangana ran away while Sukran, Sarvan, Krishnaswami and Govindaswamy went in and bolted the door from inside. This was at about 1 A.M.

The story as to what happened inside the house is also given by Sukran. He said that an old woman, presumably Meenakshi, raised an alarm. Thereupon Sarvan and Krishnaswami ran to where Peramia Goundar was sleeping. Sarvan struck on the neck of Peramia Gounder with the *veechu-aruval* and Peramia Goundar fell down from the cot. Swarnam was also in the same room and raised an alarm. Sukran approached her and struck her on the neck with the *bichuwa* knife asking her not to shout. Swarnam moved out of the way and the blow did not injure her seriously. She continued crying on which Krishnaswami hit her with the *koduval* on the neck. She fell down and died. In the meantime Govindaswamy struck the old woman who was shouting a number of times with the *koduval*. She also fell down and began to gasp for her life. At that stage they heard a sound as though somebody was tapping at the door from outside. On hearing the sound of tapping, Sarvan switched off the electric light which had been burning when they had entered the house. As it became dark, Sukran picked up a torch which was lying on the cot and flashed it. There was also a kerosene bed room light burning in the *acharam* and Govindaswamy brought that light from there. Thereafter they opened the door towards the north side and ran away.

Sukran then gave evidence as to what he had done after the incident was over. He said that in the morning he found spots of blood on his shirt. So he burnt that shirt. He washed his dhoti and towel. There were spots of blood on them as well. He buried the *bichuwa* knife underground at a distance of half a furlong from his village. Next day he came to know that the police was bringing a dog to trace the culprits. So he went in hiding for seven or eight days. He was however arrested as he was about to board a bus to go to his sister's place. After his arrest he told the police the whole story and got the *bichuwa* knife recovered from the place where he had buried it. He also showed the place where he had burnt the shirt and from there some ashes and buttons were recovered. Later he made a confession and was thereafter made an approver.

This in brief was the prosecution case. It may be noticed that the main evidence against the accused was the statement of the approver. Under section 133 of the Evidence Act, an accomplice is a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. Even so, under section 114 of the Evidence Act it is

provided that a Court may presume that an accomplice is unworthy of credit, unless he is corroborated in material particulars. So ordinarily a Court seeks for corroboration of the evidence of an approver before convicting an accused on that evidence. Generally speaking this corroboration is of two kinds Firstly, the Court has to satisfy itself that the statement of the approver is credible in itself and there is evidence other than the statement of the approver that the approver himself had taken part in the crime, secondly, after the Court is satisfied that the approver's statement is credible and his part in the crime is corroborated by other evidence, the Court seeks corroboration of the approver's evidence with respect to the part of other accused persons in the crime, and this evidence has to be of such a nature as to connect the other accused with the crime.

This Court had occasion to consider the question of an approver's evidence in *Sarwan Singh* v *The State of Punjab*[1]. After pointing out that an approver was a competent witness but that his evidence requires corroboration in material particulars, this Court observed at page 959,—

> "But it must never be forgotten that before Court reaches the stage of considering the question of corroboration and its adequacy or otherwise, the first initial and essential question to consider is whether even as an accomplice the approver is a reliable witness If the answer to this question is against the approver then there is an end of the matter, and no question as to whether his evidence is corroborated or not falls to be considered In other words, the appreciation of an approver's evidence has to satisfy a double test His evidence must show that he is a reliable witness and that is a test which is common to all witnesses If this test is satisfied the second test which still remains to be applied is that the approver's evidence must receive sufficient corroboration This test is special to the cases of weak or tainted evidence like that of the approver"

This is not to say that the evidence of an approver has to be dealt with in two water-tight compartments, it must be considered as a whole along with other evidence. Even so, the Court has to consider whether the approver's evidence is credible in itself and in doing so it may refer to such corroborative pieces of evidence as may be available But there may be cases where the evidence of the approver is so thoroughly discrepant and so inherently incredible that the Court might consider him wholly unreliable. (See *Major E. G. Barsay* v *The State of Bombay*)[2] Bearing these principles in mind we proceed to consider how the Sessions Judge and the High Court have dealt with the evidence of the approver.

The Sessions Judge was not prepared to act on the uncorroborated testimony of the approver and therefore looked for corroboration of his evidence connecting him with the crime as well as connecting the other accused persons with the crime. The corroboration on which the Sessions Judge relied related to the motive of Sarvan appellant to kill Peramia Goundar, the evidence of Thangana, the evidence of Karuppanna Nadar from whom Sarvan was said to have brought two *koduvals* that night, the evidence of Karuppanna Goundar with respect to the purchase of packet of cigarettes from him by Sarvan, the evidene of Muthuswamy Goundar (P.W. 6) to whom Sarvan is said to have gone soon after the incident, the discovery of the thumb-impression of Govindaswamy on the chimney of the bedroom lamp in the house of Peramia Goundar and the recovery of blood-stained clothes from his person and of an *aruval* at his instance which had blood-stains. The Sessions Judge accepted the story of Sukran and basing himself on this corroboration convicted Sarvan, Krishnaswami and Gonvidaswamy

The High Court scrutinised the evidence in order to satisfy itself whether there was corroboration of the evidence of the approver. It first looked into the evidence as to motive of Sarvan. There were four witnesses in this connection, namely, Karuppanna Gounder (P.W 1), Kangaya Gounder (P.W 10), Nachimuthu Goundar (P.W 12) and Balasubramaniam (P W 20). Karuppanna Gounder was produced to prove that on the morning of 11th January, 1964, Peramia Gounder had abused Sarvan and had threatened to change his will But in Court he did not give this evidence and was treated as hostile Further the High Court was apparently

1. (1957) S C J 699 (1957) M L J (Crl.) 672: (1957) S.C R. 953 (959). A.I R 1957 S C 37.

2 (1962) 1 S C J 231: (1962) M L J (Crl) 153 (1962) 2 S.C R 195 A I R 1961 (S C) 1762

not impressed by the evidence of the other three witnesses, for it pointed out that there was evidence to show that Sarvan and his wife left Peramia Gounder's house not because of any quarrel but because of the custom prevalent in the community according to which a newly married couple is kept in the bride's house for some time and then goes away. The High Court also referred to the fact that after the newly married couple went away from Peramia Gounder's house, Sarvan used to visit him often. So the High Court confined the motive of the appellant to the broad fact that the relatives of Peramia Gounder would naturally be dissatisfied with him for keeping a concubine Finally the conclusion of the High Court was that it was not prepared to dissent from the conclusion of the Sessions Judge that Sarvan had some motive against Peramia Gounder.

As to the other evidence with respect to corroboration, the High Court did not accept the evidence of Thangana. The evidence of Sukran was that Thangana had come upto the house of Peramia Gounder and helped Sarvan and Krishnaswami in jumping over the wall and then he had disappeared Thangana said that he had gone upto the house with these people out of fear and then had run away when Sarvan had jumped into the house. So the corroboration available from Thangana on which the Sessions Judge had relied disappeared. The High Court then dealt with the evidence relating to the purchase of cigarettes by Sarvan and the bringing of *koduvals* at about midnight. The High Court did not rely on the evidence of Ramaswamy Gounder (P.W. 7) and Karuppanna Gounder (P.W. 8). Therefore the corroboration arising out of the evidence of Ramaswamy and Karuppanna Gounder on which the Sessions Judge had relied also failed

The High Court however accepted the evidence of Muthuswamy (P.W 6) as to the visit of Sarvan to him soon after the incident and that was practically the sole corroboration of the evidence of the approver with respect to Sarvan besides of course the general motive to which we have already referred As to Govindaswamy the High Court relied on the fact that his thumb impression was found on the chimney of the lamp in the house of Peramia Gounder and also on the recovery of blood stained clothes from his person at the time of his arrest and the discovery of the aruval at his instance. As for the third accused Krishnaswami the High Court found that there was no corroboration worth the name against him and therefore ordered his acquittal.

Though therefore the High Court did not accept a large part of the evidence as to corroboration on which the Sessions Judge had relied, it came to the conclusion that the approver's evidence was corroborated in material particulars with respect to the two appellants and to that extent the findings of the Sessions Judge and the High Court are concurrent. Ordinarily, this Court does not go into the evidence when dealing with appeals under Article 136 of the Constitution particularly where there are concurrent findings This does not mean that this Court will in no case interfere with a concurrent finding of fact in a criminal appeal , it only means that this Court will not so interfere in the absence of special circumstances. One such circumstance is where there is an error of law vitiating the finding as, for example, where the conviction is based on the testimony of an accomplice without first considering the question whether the accomplice is a reliable witness. Another circumstance is where the conclusion reached by the Courts below is so patently opposed to well established principles of judicial approach, that it can be characterised as wholly unjustified or perverse : (see *Sawaran Singh's case*[1]).

In the present case the High Court does not seem to have addressed itself first to the question whether the evidence of the approver is credible in itself and can be relied upon. For that purpose, the approver's evidence is to be scrutinised as a whole along with other evidence and this the High Court does not seem to have done. It is true that the High Court has said that the evidence of the approver can be safely accepted and that his presence at the spot is corroborated by certain circumstances. But the High Court does not seem to have considered the evidence of the approver

1. (1957) S.C.J. 699: (1957) M L.J (Crl.) 672 : (1957) S.C.R. 953 : A I.R. 1957 S C. 637.

as a whole taking into account the infirmities which the High Court has also found in some part of his evidence. We have therefore come to the conclusion that this is a case where we must scrutinise the evidence of the approver ourselves to find out whether his evidence is credible in itself and he can be said to be a reliable witness.

The story of the approver appears to us to be incredible in itself and there is hardly any evidence to connect the approver with the crime, besides of course his own statement. This conclusion is enforced by the fact that the High Court itself has not accepted the major part of the evidence given to corroborate the approver's story. To begin with, we may refer to the statement of the approver that three days before 11th January, the had gone with Sarvan and others to commit the murder. But we are told that though these people went to commit a planned murder they did not take any weapon with which to commit the murder. The approver stated that on that occasion they had to come back because they could not get any weapon with which to commit the murder Such a story in connection with a planned murder appears to us to be inherently incredible. It is urged that it was not necessary for the approver to introduce this story if it was not true. We are not impressed with this. It may be that the approver said this to bring himself into the picture before the actual date of the murder *i e.*, 11th January. Further as to what happened on the night of 11th January, itself we find it incredible that Sarvan should have gone to Ramaswamy Gounder and Karuppanna Gounder to purchase cigarettes and to bring *koduvals* and thus proclaim their presence near the house of Peramia Gounder at about the time when the murders were committed The High Court has disbelieved the evidence of Ramaswamy Gounder and Karuppanna Gounder but has failed to notice that the result of this disbelief makes the story of the approver completely incredible Further the High Court has disbelieved the part played by Thangana and that again shows that the story of the approver with respect to him is also false Then there is the circumstance deposed to by the approver that there was electric light in the house of Peramia Gounder which was switched off when somebody knocked at the door from outside. The High Court has held that the statement of the approver that there was electric light in the house of Peramia Gounder was false But the High Court failed to notice that if that statement was false it shows that the whole story given by the approver is incredible It is impossible to believe that if the approver had really gone to take part in the crime and there was no electric light in the house, he could say that there was electric light, which was switched off when somebody knocked at the door from outside. Here again though the High Court holds that the story of the approver as to electric light being in the house is false, it has not drawn the obvious conclusion following from this falsehood, namely, that such a falsehood could not have been spoken if the approver had really gone into the house and taken part in the crime. Further the prosecution case is that the murders were discovered in the morning at 7 A.M. when the maid-servant went to the house of Peramia Gounder as usual ; but the evidence of the approver is that in the night while these people were still in the house, somebody knocked from outside and that alaram had been raised both by Swarnam as well as her mother Meenakshi. Now if it is true that somebody had knocked at the door in the night while the murders were being committed, it is impossible to believe that that person should not have investigated further, when according to the approver the electric light was switched off on the knock being heard. The whole story of somebody having kncoked at the door of the house therefore appears to us to be a falsehood, and this can only mean that the story put forward by the approver as to what happened in the house is untrue.

Then it is remarkable that though the approver was hired on promise of payment of Rs. 1,000 and leasing of six acres of land to him, he took hardly any part in the murders. All he did according to his evidence was to aim a blow at Swarnam which was ineffective The rest of the work was all done by the other accused persons and so it seems that the approver was apparently taken merely to be a witness to the incident so that he could give evidence as approver. Further there is no independent evidence to corroborate the approver's statement that he had taken part in this crime once the evidence which the High Court has discarded is left out. The only

evidence to which the High Court refers is the recovery of the *bichuwa* knife at the instance of the approver. This *bichuwa* knife has been found to have minute stains of blood. This knife, according to the approver, was used by him to hit Swarnam once; but the presence of such minute stains of blood on this *bichuwa* knife which apparently belonged to the approver cannot in our opinion show that the approver had gone to the scene of crime and had taken part in it. As to the recovery of ashes with some buttons, that in our opinion is no corroboration of the approver's part in the murder Therefore so far as the evidence of the approver is concerned it appears to us to be incredible in itself and there is no independent corroboration to show that the approver had taken part in this crime.

Once we have reached the conclusion that the evidence of the approver is incredible and there is no corroboration thereof to show that the approver had taken part in this crime, there is really no necessity for further consideration of the question whether the approver's evidence has been corroborated with respect to the other accused connecting them with the crime. Even so, we propose to consider the evidence which the High Court thought was corroboration of the approver's evidence with respect to the two appellants before us. As to the third accused, the High Court was of the opinion that there was no corroboration of the evidence of the approver with respect to him, and that was why the High Court acquitted him

Now the only corroborating evidence with respect to Sarvan appellant on which the High Court relied was the motive and the statement of Muthuswamy Gounder (P.W. 6). The motive found by the High Court, in this case would apply not only to Sarvan but to all other relatives. What the prosecution had tried to prove was that on 11th January, Peramia Gounder had in so many words told Sarvan that he would change his will. But that was apparently not accepted by the High Court which based itself only on the broad probability that in the circumstances existing at the time, relatives of Peramia Gounder would not be happy with him That in our opinion can hardly be said to be corroboration of the approver's evidence connecting Sarvan with the crime, though it may be a circumstance to be borne in mind in case other evidence proves the connection. We may also notice that this threat of changing the will is said to have been given on 11th January, while the evidence of the approver is that the murder was being planned even from before. So the planning of the murder does not appear to be due to any specific threat to Sarvan, and we are left with the general displeasure which the relatives of Peramia Gounder would be feeling against him because he had kept a concubine and was kind to her relatives.

Muthuswamy stated that Sarvan came to him on the night of the murder He saw blood on his hands and legs and asked him about it. Sarvan told him that Peramia Gounder, his concubine Swarnam and her mother Meenakshi had been murdered Sarvan also said that there was blood on his veshti and shirt and wanted the witness to give him a veshti and a shirt to change The witness did so Sarvan then washed his hands and legs and asked the witness to burn his shirt and veshti which had blood-stains Thereafter Sarvan left and the witness burnt the veshti and shirt given to him by Sarvan His father woke up thereafter and the witness told him everything The High Court has said that the evidence of this witness did not appear to be improbable : but it apparently did not consider why Sarvan should have gone to this witness at all in the night and thus create evidence against himself It does not appear that there was any particular friendship between the witness and Sarvan The case of the witness was that his father was a lessee of Sarvan's grand-father, but it appears that the land had been given up by the father of the witnesss before the witness came to give evidence The suggestion on behalf of Sarvan was that there was bad blood between Sarvan's grand-father and the father of the witness, and that appears to be borne out by the fact that the father of the witness has vacated the land Further the contention on behalf of Sarvan is that this witness is a sort of accomplice, if his evidence is to be believed, inasmuch as he burnt the blood-stained clothes which Sarvan was wearing, and as such corroboration by him of the evidence of the approver is of no value If the evidence of the witness is true, there is no doubt that he helped in doing away with the evidence of

the crime inasmuch as he burnt the blood-stained veshti and shirt of Sarvan and he could have been prosecuted under section 201 of the Indian Penal Code Even if the witness was not an actual accomplice in the crime itself, he certainly on his own showing helped the accused in destroying the evidence of the crime It is also remarkable that the witness said nothing about this incident to anybody, though the murders of Peramia Gounder, Swarnam and Meenakshi must have been known all over the village the next morning. It seems to us therefore that the evidence of this witness is of a very doubtful character, firstly, because there was hardly any reason why Sarvan should have gone to him in the night, secondly, because he said nothing about what had happend at his cattle-shed to anybody for three days, though he must have known of the murders of Peramia Gounder, Swarnam and Meenakshi the next morning, and also because he apparently helped Sarvan on his own showing in destroying the evidence of the crime. He did say that he told his father about it in the night, but his father also never informed anybody. These circumstances do not appear to have been considered by the High Court and in the circumstances we are not prepared to rely on the evidence of this witness. Once that is so, there is on corroboration whatsoever even of the incredible story related by the approver so far as Sarvan is concerned.

As to Govindaswamy, the main evidence on which the High Court has relied for the purpose of corroboration is the thumb impression of Govindaswamy found on the chimney of a lamp which was said to be burning in the house of Peramia Gounder. In this connection the evidence of the approver was that Govindaswamy had brought the burning lamp from one place to another place during the time when the crime was being committed, and the suggestion is that while doing so his thumb-impression came to be on the chimney of the lamp. On the other hand, Govindaswamy's explanation was that he used to go often with Sarvan to the house of Permia Gounder and do small jobs there. In that connection he had cleaned the chimney of the lamp a number of times. The suggestion of Govindaswamy was that that might explain his thumb-impression found on the chimney. A choice has to be made between these two explanations for the presence of the thumb impression of Govindaswamy on the chimney. So far as the approver's evidence is concerned, there are two serious improbabilities in that connection apart from the fact that he gave out this fact at a late stage. In the first place no one bringing a lamp from one place to another would catch hold of the chimney, particularly when the lamp was burning at the time, for in doing so he might burn his fingers or thumb. In the second place, it is most improbable that anybody can carry a lamp from one place to another by holding the chimney, for in such a case the chances are that the lamp would fall down and only the chimney would remain in the hands of the person carrying it. So the story that the thumb-impression could have been caused while Govindaswamy was bringing the lamp from one place to another on that night is incredible and cannot be believed On the other hand the explanation of Govindaswamy does not appear to be an impossible one He is an ordinary cultivator aged 22 years and is apparently a friend of Sarvan, for otherwise he could not have been asked by Sarvan to join in such an affair His statement that he used to go with Sarvan to Peramia Gounder's house therefore does not appear to be improbable ; nor does it appear improbable that such a person might have cleaned the chimney on such visits to oblige the grand-father of his friend Sarvan The presence therefore of Govindaswamy's thumb-impression on the chimney cannot in the circumstances corroborate the evidence of the approver, incredible as it is by itself As to the recovery of blood-stained clothes from his person, the evidence does not show the extent of such blood stains. The presence of any minute blood stains on the clothes of a villager like this accused can hardly amount to corroboration of the approver. As to the *aruval*, the nature of the blood stains on it has not been established. In any case, when the evidence of the approver is incredible in itself, such corroboration is of no value.

On a careful consideration of the evidence and the circumstances of this case we are of the opinion that the approver's evidence is incredible and his taking part in the crime has not been corroborated by any independent evidence besides his.

own statement. There is also in our opinion hardly any corroboration of the approver's incredible evidence in material particulars connecting the other accused with the crime We would therefore allow the appeal, set aside the conviction of Sarvan and Govindaswamy and order their acquittal.

ORDER OF THE COURT :—In accordance with the opinion of the majority the appeal is dismissed.

K.S. *Appeal dismissed.*

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## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, *Chief Justice*, K N. WANCHOO, V. RAMASWAMI AND P. SATYANARAYANA RAJU, JJ.

Srinivasa Reddiar and others .. *Appellants**

*v.*

N. Ramaswamy Reddiar and another .. *Respondents.*

*Limitation Act (IX of* 1908), *Article* 134-*B—Applicability—Endowed property—Alienation by service-holder in possession and enjoyment—*Qua *owners subject to an obligation—Alienors leaving the village after disposal of all the properties—*De facto *trustees in management of temple and matam for over* 25 *years—*De jure *trustees appointed later by the Deputy Commissioner of Hindu Religious and Charitable Endowments—Right to recover possession if barred.*

Consequent on the order of a Magistrate having jurisdiction under section 87 of the Madras Hindu Religious and Charitable Endowments Act (XIX of 1951) directing the alienees of property endowed to a temple to deliver possession to the duly appointed Trustees thereof the alienees filed a suit for declaration of title and injunction against the trustees and the Deputy Commissioner who appointed them restraining the defendants from interfering with their possession The trial Court decreed the suit and the Subordinate Judge on appeal, confirmed the same In Second Appeal the High Court of Madras reversed the finding of the Courts below—that the properties were not endowed properties and even otherwise the (plaintiffs-appellants) have prescribed for the title and arrived at the finding; (*a*) that there was in existence a temple and the properties in suit were properties endowed, (*b*) that they have been transferred by persons who must be deemed to be the previous managers of the temple , (*c*) that the transfers were for valuable consideration , so that Article 134-B applies, and therefore the sales within 12 years of the introduction of Article 134-B (in 1929) were held not binding on the trustees-defendants The appeal was partly allowed in respect of properties conveyed under these sales The appellants (plaintiffs) preferred this appeal to the Supreme Court by Special Leave

*Held*, the ingenious contention of the Counsel for the appellants that the sales purported to transfer the properties by the alienors not as *poojaris* or managers of the temple but as secular owners thereof though burdened with an obligation to render service and therefore Article 144 of the Limitation Act applies and not Article 134-B, has to be rejected

Case-law reviewed and discussed

Article 134-B applies to all cases where it is shown that (1) the immovable properties were comprised in the endowment, (2) it was transferred by the previous manager; and (3) it was for a valuable consideration. The nature of the representations made by the previous manager in regard to his relation with the properties transferred is irrelevant On the findings of the High Court the requisites for applicability of the article are satisfied , this appeal has to be decided on the basis that it applies

The High Court, relying on the fact that the alienors were alive, perhaps thought that the question of adverse possession could not be sustained, and did not discuss the question whether the facts proved did not show that the alienors had been removed from office 25 years ago as held by the trial Court the 1st appellate Court had not given any clear and specific decision on the matter but maintained adverse possession on other grounds

The facts brought on record clearly show not only that the alienors disposed of all the properties and left the village long ago but also for the past 25 years or so the management was taken over by other persons who were acting as *de facto* manager of the temple If that be so, there is no escape from the conclusion that more than 12 years have elapsed since the date of removal of the previous manager who transferred the properties in question, and so if the respondents 1 to 3 (the trustees *de jure*) brought a suit on the date of their appointment by the 4th respondent it would be barred by Article 134-B (time begins to run from the death, resignation or removal of the previous manager.) The trial Court and the lower appellate Court were right in decreeing the appellants' suit in full

*Quaere* If a part of the property is transferred by the manager of a religious endowment on the basis it belongs to him and not to the religious endowment, whether such a transfer is void *ab initio* with result possession of the transferee is adverse to the endowment from its inception and the right of

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*C A No 801 of 1963. 16th December, 1965.

the succeeding manager to challenge the transfer is lost if his predecessor (alienor) lives for more than 12 years after the transfer (not decided as unnecessary for the instant appeal.)

Appeal by Special Leave from the Judgment and Decree dated the 2nd September, 1959 of the Madras High Court in Second Appeal No. 774 of 1957.

*T. V. R. Tatachari*, Advocate, for Appellants.

*P. Raghaviah* and *R. Ganapathy Iyer*, Advocates, for Respondents.

The Judgment of the Court was delivered by

*Gajendragadkar, C.J.*:—The present appeal has been brought to this Court by Special Leave and it arises from a suit filed by the appellants against four respondents. The properties involved in the suit consist of agricultural lands situated in Eragudi village, Musiri taluk, Tiruchirappalli district. According to the appellants, the said lands had been granted in Inam to the ancestor of one Ambalathadum Pachai Kandai Udayavar by the Carnatic Rulers before the advent of the British power in India. The original grant-deeds are not available; but at the time of the settlement of the Inams in the sixties of the last century, Inam title deeds were issued in favour of the family of Pachai Kandai Udayavar. The appellants averred that the properties covered by the grant had been granted in Inam to the original grantee burdened with the obligation of performing certain services in a Matam. The said properties were alienated from time to time, and as a result of the last alienation, the appellants became entitled to them. The appellants in the present litigation claimed a declaration about their title to the properties in suit and a permanent injunction restraining respondents 1 to 3, who claimed to be the trustees of an alleged Pachai Kandai Udayavar Temple at Eragudi, from interfering with their possession of the same. Respondent No. 4 is the Deputy Commissioner, Hindu Religious and Charitable Endowments, Tiruchirappalli, and he has been impleaded because he has purported to appoint respondents 1 to 3 as trustees of the said alleged Temple on the 7th March, 1951. This suit (No. 103 of 1954) was instituted on the 13th September, 1954, under section 87 of the Madras Hindu Religious and Charitable Endowments Act (XIX of 1951) (hereinafter called 'the Act') in the Court of the District Munsif at Turaiyur.

Respondents 1 to 3 who have been appointed as trustees of the said temple by respondent No. 4, obtained a certificate from him that the properties in question belonged to the Temple; and on the basis of the said certificate, they had filed an application before the Magistrate having jurisdiction on the area under section 87 of the Act for possession. Notice of this application was served on the appellants and they pleaded their own title to the properties. The Magistrate, however, overruled the claim made by the appellants and directed them to deliver possession of the properties to respondents 1 to 3. Before this order could be executed and possession delivered to respondents 1 to 3, the appellants instituted the present suit.

Respondents 1 to 3 resisted this suit and contended that the properties in suit had not been granted to the predecessor of Pachai Kandai Udayavar as alleged by the appellants. Their case was that the said properties had been granted to the Pachai Kandai Udayavar Temple and formed part of its properties. As trustees appointed by respondent No. 4, they claimed that they were entitled to the possession of the properties.

On these pleadings, four substantive issues were framed by the learned trial Judge; they were: whether the grant of the Inam was a personal Inam; whether the grant of the Inam was a religious endowment; whether plaintiffs have title to the suit properties; and whether plaintiffs have acquired title by prescription. On the first two issues, oral and documentary evidence was adduced by the parties. The learned trial Judge examined the whole evidence and came to the conclusion that the grant of the Inam was a personal Inam, and that it was not a grant in favour of the religious endowment within the meaning of the Act. That is how the first two issues were answered in favour of the appellants. In consequence, the learned trial Judge also held that the appellants had proved their title to the suit properties. The alternative plea made by the appellants that they had acquired title to the pro-

perties by prescription, was also upheld by the trial Judge. In the result, the appellants' suit was decreed on the 14th February, 1955

Respondents 1 to 3 preferred an Appeal (No. 129 of 1955) in the Court of the Subordinate Judge at Tiruchirappalli, challenging the correctness of the said decree The lower appellate Court considered three main points, they were· whether the grant was in favour of Ambalathadum Pachai Kandai Udayavar ; whether there is a temple, and whether the plaintiffs had prescribed their title to the suit properties by adverse possession The lower appellate Court made a finding against respondents 1 to 3 on point No 2 It held that the evidence adduced by the respondents did not prove the existence of any temple in favour of which the original grant had been alleged to have been made according to them On that view, it thought it unnecessary to consider the first point. In regard to the third point based on the appellants' claim that they had acquired title by adverse possession, the lower appellate Court found that,

> "it was evident that from the very beginning Pachai Kandai Udayavar and his family had been claiming beneficial interest in the property and they were not holding the same as managers of the trust. The alienations, must, therefore, be regarded only as repudiation of the trust."

In the result, the lower appellate Court's finding was that the appellants had established their claim of prescriptive title. The appeal preferred by respondents 1 to 3, therefore, failed and was dismissed with costs on 29th March, 1957

The decision was challenged by respondents 2 and 3 before the Madras High Court in Second Appeal (No. 774 of 1957). Subrahmanyam, J who heard the appeal held that the original grant had been made in favour of the Temple There was evidence to show that the properties originally granted had been resumed by the Collector ; but the learned Judge took the view that the said resumption was only of the melwaram or assessment, and that since the lands had been granted in Inam to the deity and its matam, their title to the lands remained unaffected by the resumption proceedings. In other words, he negatived the appellants' claim that the original grant was in favour of their predecessors-in-title, though burdened with an obligation to render service to the matam. The learned Judge reversed the finding of the lower appellate Court that the existence of the Temple had not been proved.

Having thus held that the properties belonged to the Temple, the learned Judge proceeded to consider the question of limitation by reference to the several alienations with which the present litigation is concerned. In dealing with the question of limitation, the learned Judge took the view that the present suit would be governed by Article 134-B of the Indian Limitation Act. This article has been introduced in the said Act by Amending Act I of 1929 and came into force on 1st January, 1929 It was conceded before the lower appellate Court that the new article was not retrospective in operation and that if the title of the alienees in regard to 'dharmadayam' properties had been acquired by adverse possession prior to 1st January, 1929, it would not be affected by the provisions of Article 134-B. Thus considered, the alienations in regard to items 1, 2 part of item 3, items 7 and 8, and a portion of the well in item 5 sold under Exhibit A-2 in 1914 were held to be outside the mischief of Article 134-B The possession of the vendees in regard to the properties covered by the said sale deed was held to have conferred title on them. Similarly, item 4 and a part of item 6 which had been sold in auction in execution of a decree in 1927 (*vide* Exhibits A-7 and A-8), were also held to be outside the scope of Article 134-B, because the said article does not cover auction sales.

That left the alienations covered by Exhibits A-3, A-6 and A-12 to be considered. These three alienations were effected on the 7th October, 1917, 2nd July, 1926, and 2nd July, 1926 respectively. The High Court held that the properties covered by these sale-deeds fell within the purview of Article 134-B, and the appellants title in respect thereof was open to challenge In the result, the appellants' claim in regard to the properties covered by these three sale-deeds was rejected, whereas their claim in regard to the other properties was upheld. In consequence, the appeal preferred by respondents 2 and 3 was partly allowed and the decree passed by the

lower appellate Court in regard to Exhibits A-3, A-6 and A-12 was set aside This judgment was pronounced on the 2nd September, 1959 It is against this decision that the appellants have come to this Court by Special Leave

Mr. Tatachari for the appellants has raised before us an interesting question of law. He contends that Article 134-B would not apply to the present case, because the alienations evidenced by Exhibits A-3, A-6 and A-12 show that the alienors purported to transfer the properties not as Poojaris or managers of a temple, but in their individual character as owners of the said properties The documents recite that the properties belonged to the alienors as their separate secular properties, though burdened with an obligation to render service to the Matam ; and that shows that the transfer was effected not by the Poojaris of the temple, but by the persons who claimed that the properties belonged to them. Such a case falls outside the purview of Article 134-B and must be governed by Article 144 of the First Schedule to the Limitation Act.

Mr. Tatachari also argues that in applying Article 144, we must assume that the possession of the alienees was adverse to the temple from the respective dates of the alienations when they were put in possession of the properties covered by the transactions in question. In support of this argument, Mr. Tatachari has relied on the statement of the law made by Mr. Justice Mukherjea in his lectures on the Hindu Law of Religious and Charitable Trust[1]. Says Mr. Justice Mukherjea

> " if the transfer of (debutter property) is not of particular items of property, but of the entire endowment with all its properties, the possession of the transferee is unlawful from the very beginning. The decisions in *Gnanasambanda Pandara Sannadhi* v *Velu Pandaram and another*[2], and *Damodar Das* v. *Adhikari Lakhan Das*[3], are illustrations of this type of cases."

He also added that transfer would similarly be void and limitation would run from the date of the transfer, if the manager transfers the property as his own property and not as the property of the deity The same statement has been made by the learned author in two other places in the sourse of his lectures.

The argument is that in cases falling under Article 134-B, the transfer made by the manager of a Hindu endowment is challenged by his successor on the ground that it was beyond the authority of the manager , and such a challenge necessarily postulates that the transfer was effected by the manager as manager purporting to deal with the property as belonging to the religious endowment. Where, however, the transfer is made by the manager not as manager, but as an individual, and he deals with the property not on the basis that it belongs to the religious endowment, but on the basis that it belongs to himself, considerations which would govern the application of limitation are substantially different ; and in such a case, the transfer being void *ab initio* the possession of the transferee is adverse from the date of the transfer. That is how Mr. Tatachari has attempted to avoid the application of Article 134-B in the present case. There can be no doubt that if the assumption made by Mr. Tatachari is well-founded, the appellant's title to the three transactions in question would have to be upheld.

It is well-known that the law of limitation in regard to suits instituted to set aside unauthorised alienation of endowed property by a Shebait or a Mahant or a manager of a Hindu religious endowment was very uncertain prior to the decision of the Privy Council in *Vidya Varuthi Thirtha* v. *Balusami Ayyar and others*[4]. That is why subsequent to the said decision, any discussion about the question of limitation relating to such suits necessarily begins with a reference to the principles laid down by the Privy Council in *Vidya Varuthi's case*[4]. In that case, the Privy Council held that the endowments of a Hindu math are not " conveyed in trust ", nor is the head of the math a " trustee " with regard to them, save as to specific property proved to have been vested in him for a specific object. The question which the Privy Council had to consider in that case was whether Article 134 applied to

1 Mr Justice B K Mukherjea on 'Hindu Law of Religious and Charitable Trust' II Edn. (1962) p 282

2 (1899) L R. 27 I A 69: I.L R. 23 Mad. 271 10 M L J. 29.

3. (1910) L R 37 I A. 147 : 20 M L J 624.

4. (1921) L R 48 I A. 302 : I L R 44 Mad 831 . 41 M L J. 346 A.I R. 1922 P C 123

a suit in which the validity of a permanent lease of part of the math property granted by the head of a math was challenged. Article 134 covers suits brought with a view to recover possession of immovable property conveyed or bequeathed in trust or mortgaged and afterwards transferred by the trustee or mortgagee for a valuable consideration These words used in column 1 of Article 134 necessarily raise the question as to whether the head of a math is a trustee within their meaning , and Mr. Justice Ameer Ali, who spoke for the Privy Council, answered that question in the negative In consequence, the argument that Article 134 applied, was repelled, and it was held that Article 144 would govern such a case.

In fact, it is substantially because of this decision that Articles 134-A, 134-B and 134-C; and Articles 48-A and 48-B came to be inserted in the First Schedule to the Limitation Act by Amending Act I of 1929 At the same time, section 10 of the Limitation Act was amended by addition of an explanatory clause which provided, *inter alia*, that for the purposes on section 10, any property comprised in a Hindu religious or charitable endowment shall be deemed to be property vested in trust for a specific purpose, and the manager of any such property shall be deemed to be the trustee thereof As we have already noticed, these newly added provisions in the Limitation Act came into force on the 1st January, 1929.

Reverting then to the question as to whether a transfer effected by the manager of a temple in regard to properties belonging to the temple falls outside the purview of Article 134-B if it is shown to have been made on the basis that the transferor treated the properties as his own, it does appear that the two earlier Privy Council decisions in *Gnanasambanda*[1] and *Damodar Das*[2], lend some support to the contention. In *Gnanasambanda's case*[1], it was held by the Privy Council that where hereditary trustees of a religious endowment sold their hereditary right of management and transferred the endowed property, the sales were null and void, in the absence of a custom allowing them , and that the possession taken by the purchaser was adverse to the vendors and those claiming under them. In appreciating the effect of this decision, it is necessary to bear in mind that the plea of limitation with which the Privy Council was concerned in that case was based on Article 124 of the Limitation Act Article 124 relates to suits filed for possession of a hereditary office, and the limitation prescribed for such suits starts when the defendant takes possession of the office adversely to the plaintiff It is clear that in that case, what had been sold was the hereditary office, as well as the properties belonging to the endowment , and so, it was plain that limitation began as soon as the purchaser took possession of the office under Article 124. It is true that immovable properties belonging to the temple had also been sold , but the Privy Council expressly ruled that there was no distinction between the office and the property of the endowment. The one is attached to the other , but if there is, Article 144 of the same Schedule is applicable to the property, and that bars the suit after 12 years' adverse possession. It may be permissible to state that this latter observation was made in 1899 long before the Privy Council enunciated the true legal position in regard to the status of the managers of Hindu religious endowments in *Vidya Varuthi's case*[3].

Similarly, in *Damodar Das's case*[2] while dealing with the validity of an ' ikrarnama ' of a debuttor property executed by the manager of the property, the Privy Council observed that from the date of the ikrarnama, the possession of the transferee was adverse to the right of the idol and that led to the conclusion that the suit instituted against the transferee was barred by limitation There is no discussion about the status and character of the Chela who made the transfer nor about the right of the succeeding Chela to challenge the validity of the transfer effected by his predecessor which was subsequently recognised by the Privy Council in *Vidya Varuthi's case*[3].

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1 (1899) L R 27 I A 69 I L R 23 Mad. 271 : 10 M L J 29.
2. (1910) L.R. 37 I.A. 147 : 20 M.L J. 624.
3 (1921) L R 48 I A 302 · I.L R 44 Mad 831 : 41 M L J 346 : A.I.R. 1924 P.C. 123.

These two judgments have, no doubt been incidentally referred to by the Privy Council in *Mahant Ram Charan Das* v. *Naurangi Lal and others*[1], and in *Mahadeo Prasad Singh and others* v. *Karia Bharti*[2], though the decision in the said two cases proceeded in the light of the legal position enunciated by the Privy Council in *Vidya Varuthi's case*[3].

It would thus be seen that the observations made by Mr. Justice Mukherjea on which Mr Tatachari relies, really purport to extend the principle which has apparently been mentioned by the Privy Council in *Gnanasambanda's case*[4] It does appear that Mr Justice Mukherjea had expressed this view as a Judge of the Calcutta High Court in the case of *Hemanta Kumari Basu* v *Sree Sri Ishwar Sridhar Jiu*[5], and had relied on the two Privy Council's decisions in *Gnanasambanda*[4] and *Damodar Das's case*[6] In the case of *Hemanta Kumari Basu*[5], the attention of Mukherjea, J , was drawn to the fact that in an earlier decision of the Calcutta High Court in *Ronald Duncan Cromartie and Francis Arthur Shephard Sutherland* v. *Sri Sri Iswar Radha Damodar Jew and others*[7], D N. Mitter, J , had made observations which were inconsistent with the view which Mukherjea, J , was disposed to take ; but the learned Judge commented on the said observations by saying that they were open to criticism.

Thus, on the question raised by Mr. Tatachari before us, there does appear to be some divergence of opinion in the Calcutta High Court itself No other decision has been cited before us which has accepted the proposition that if any part of the property belonging to a Hindu religious endowment is transferred by its manager, the transfer is void and the possession of the transferee becomes adverse to the endowment from the very beginning In fact, as we have already indicated in the case of *Gnanasambanda*[4], what had been transferred unauthorisedly, was the religious office itself and all the properties appertaining thereto. It is open to doubt whether the said decision could lead to the inference that if a part of the property is transferred by the manager of a religious endowment on the basis that it belongs to him and not to the religious endowment the transfer is void *ab initio*, with the result that the possession of the transferee is adverse to the religious endowment from the very beginning and the succeeding manager's right to challenge the said transfer would be lost if his predecessor who made the transfer lives for more than 12 years after effecting the transfer.

In the words of Sir John Edge, who spoke for the Privy Council in *Nainapillai Marakayar and others* v. *Ramanathan Chettiar and others*[8].

> " in the case of a Shebait a grant by him in violation of his duty of an interest in endowed lands which he has no authority as Shebait to make may possibly under some circumstances be good as against himself by way of estoppel, but is not binding upon his successors "

It is not easy to see why the successor's right to challenge an unauthorised alienation made by his predecessor should be affected adversely if the alienation is made by his predecessor on the basis that the property belonged to him and not to the religious endowment.

However, we do not think it necessary to decide this point in the present case, because, in our opinion, the plain words of Article 134-B do not permit such a plea to be raised. Column 1 of Article 134-B provides for suits brought, *inter alia*, by the manager of a Hindu religious or charitable endowment to recover possession of immovable property comprised in the endowment which has been transferred by a previous manager for a valuable consideration The period prescribed for such suits is 12 years, and the time from which the period begins to run is the death, resignation or removal of the transferor. Confining ourselves to the first column of Article 134-B at this stage, the question which we have to decide is does this article permit any distinction to be made between transfers effected by a previous manager on the

1 (1933) L R 60 I A 124 64 M L J 505 271 A I R 1933 P C 75
2 (1934) L R 62 I A 47 68 M L J 499 : A I R 1935 P C 44
3 (1921) L R 48 I A 302 · I L R 44 Mad 831. 41 M L J 346 A I R 1924 P C 123
4. (1899) L.R. 27 I.A. 69 : I.L.R. 23 Mad. 10 M L J 29.
5 I L R (1946) 2 Cal 38
6 (1910) L R 37 I A 147 20 M L J 624.
7 (1935) 60 C L J 72
8 (1924) L R 51 I A 83 at p 97 · I L R 47 Mad 337 : 46 M L J 546. A I R. 1924 P.C. 65.

basis that the property transferred belongs to the religious endowment, and those made by him on the basis that the said property is his own private property ? If the property is transferred by the manager on the basis that it belongs to the endowment, Article 134-B clearly applies , but does it make any difference to the application of Article 134-B if the transfer is made on the other basis that the property belongs not to the endowment, but to the manager himself ? In either case, the successor who challenges the alienation, will have to prove that the property in fact belongs to the religious endowment Once that is proved, is it necessary for him also to show that the transfer was made on the basis that the property belonged to the religious endowment ? In our opinion, such a limitation cannot be read in the words used by the said article Article 134-B applies to all cases where it is shown that the immovable property was comprised in the endowment, and that it has been transferred by a previous manager for a valuable consideration The successor has to prove three facts (1) that the property belongs to the religious endowment , (2) that it was transferred by a previous manager ; and (3) that the transfer was for a valuable consideration The character of the representations made by the previous manager in regard to his relation with the property which is the subject-matter of transfer, is irrelevant for the purpose of Article 134-B All transfers made would fall within Article 134-B if the three essential facts are proved by the successor of the transferor manager of the Hindu religious endowment. Therefore, we do not think that Mr Tatachari is justified in contending that the transfers with which we are concerned in the present appeal fall outside the purview of Article 134-B inasmuch as they are effected by the alienors on the representations that the properties transferred belonged to them as their separate properties On the findings recorded by the High Court, it is clear that the properties belonged to the temple ; that they have been transferred by persons who must be deemed to be the previous managers of the temple ; and that they have been transferred for valuable consideration. The present suit has been brought against respondents 1 to 3 who are appointed trustees of the temple by respondent No 4, and so, all the ingredients prescribed by the first column of Article 134-B are satisfied That is why we must reject the ingenious argument urged before us by Mr. Tatachari that Article 134-B does not apply to the present case

We may, in this connection, refer to the decision of the Privy Council in *Mahant Sudarsan Das* v *Mahant Ram Kirpal Das and others*[1] In that case, the question which arose for the decision of the Privy Council was whether Article 134-B applied to a case where debuttor property had been sold in an execution sale, and the Privy Council held that it did not. " To apply Article 134-B to an execution sale ", observed Lord Radcliffe,

> " involves a reading of that article which would construe the words ' transferred by a previous manager for a valuable consideration ' as covering an execution sale under Court process, and the word ' transferor ' as extending to the judgment-debtor whose land is sold It is not only that the words themselves do not properly bear that meaning Apart from that, what is in all essentials the same question was considered on several occasions by Courts in India before Articles 134-A and 134-B had been added to Article 134 That Article contains the analogous phrase ' transferred by the trustee or mortgagee for valuable consideration ' and there was a uniform current of decision to the effect that these words were incapable of applying to an execution sale "

What was said by the Privy Council about the impropriety of including an execution sale within the meaning of Article 134-B can, with equal justification, be said about introducing words of limitation in the said article which alone can exclude transfers made by the previous manager of the Hindu religious endowment on the basis that the property transferred belonged to him Therefore, we must deal with the present appeal on the basis that Article 134-B applies to the facts of the present case.

Mr Tatachari then contends that even on the application of Article 134-B, the decision of the High Court is erroneous, because on the facts proved in this case, the High Court should have drawn the legal inference that the transferor had been

1 (1950) 1 M L J 243 . L R 77 I A 42 at pp. 49-50 A.I.R. 1950 P C 44.

removed more than 12 years before the suit was filed He contends that the question as to whether on facts proved in the present case, an inference can be drawn that the previous manager or trustee had been removed, is a mixed question of fact and law, and the High Court was in error in reversing the decisions of the Courts below by holding that the title of the temple had not been lost by adverse possession before the suit was filed For deciding this question, it is necessary to refer to some material facts.

The transferor is Pachaikandaswamiar The appellants' case before the trial Court was that Pachaikandaswamiar had resigned his position about 27 years ago, and that even if Article 134-B applied, limitation should be held to have commenced from the date when the alienor either resigned his office or was removed from it In dealing with this aspect of the matter, the learned trial Judge has examined the oral evidence led on behalf of the parties He assumed that Pachaikandaswamiar and his son were alive at the date of the suit Even so, he found that they had left the village and had taken no part whatever in the management of the worship of the temple In fact, almost all the properties belonging to the temple had in course of time, been alienated and the alienors were no longer interested either in the temple or in staying in the village itself Raju Iyer, who was examined as a witness by the appellants, stated that he and Amirthalinga Iyer had been performing the worship of the temple for the past 27 years, and he added that the alienor and his son had left the village more than 25 years ago, and but for very casual visits to the village, they had never taken any interest in the temple or in the management of its affairs In fact, Ranga Raju Reddiar, whom the respondents examined, admitted in reply to the questions put by the Court that since 25 years or so neither Pachaikandaswamiar nor Chinnaswami Iyer had performed any pooja in the temple He substantially corroborated the statement of Raju Iyer that Raju Iyer and Amirthalinga Iyer had been performing the worship of the temple Another witness, Chandrasekara Iyer by name, whom the respondents examined, also admitted that Pachaikanda had sold away all his properties and had left the village Besides, when respondents 1 to 3 were appointed as trustees of the temple, a notice was issued by the office of Assistant Commissioner for Hindu Religious Endowments, Tiruchirappylli, on the 19th June, 1948, in which it was specifically averred that there were no legally constituted trustees for Shri Pachaikanda Udayavar Temple, Eragudi, and it was mismanaged, and so, it was proposed to appoint legally constituted trustees for the said temple This notice was served on witness Raju Iyer and Amrithalinga Iyer, Chinnasamy Iyer and Rangaraja Reddiar, who were performing the worship and acting as *de facto* managers of the temple It is remarkable that this notice describes Amirthalinga Iyer and Chinnasamy Iyer as *de facto* trustees of the temple

It is on these facts that the learned trial Judge held that the alienor must be deemed to have resigned his office or left it The lower appellate Court does not appear to have considered or made any specific or clear finding on this aspect of the matter It, however, held that the transferor and his family had been claiming beneficial interest in the properties all along and that they were not holding the same as managers of the trust That is why he confirmed the finding of the trial Judge on the question of adverse possession, though on a somewhat different ground.

The High Court has relied on the fact that the alienor is still alive, and so, it thought that the plea of adverse possession could not be sustained Unfortunately, the question as to whether the facts proved in this case did not show that the alienor had been removed from office by other persons who were in management of the temple *de facto*, has not been discussed by the High Court In our opinion, all the facts which have been brought on the record in relation to this aspect of the matter, clearly show not only that the alienor disposed of all the property and left the village, but also that for the last 25 years or so, the management has been taken over by other persons who are acting as *de facto* managers of the temple This evidence appears to us to show that the alienors had been removed from management of the temple and other persons have taken up the position as *de facto* managers ;

and this position has lasted for more than 25 years If that be so, there is no escape from the conclusion that more than 12 years have elapsed since the date of the removal of the previous manager who transferred the properties in question , and so if a suit were brought by respondents 1 to 3 on the date when they were appointed trustees by respondent No 4, it would be barred under Article 134-B On that view of the matter, we must hold that the trial Judge and the lower appellate Court were right in decreeing the appellants' suit in its entirety We must accordingly set aside the decree passed by the High Court in regard to the transfers covered by Exhibits A-3, A-6 and A-12, and restore that of the lower appellate Court. In the circumstances of this case, we direct that parties should bear their own costs

K G S *Appeal allowed, Decree in first appeal restored*

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THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction )

PRESENT —J C SHAH, V. RAMASWAMI AND V. BHARGAVA, JJ

RM AR AR RM AR. AR Ramanathan Chettiar .. *Appellant**

*v.*

Commissioner of Income-tax, Madras .. *Respondent.*

*Income-tax Act (XI of 1922)—Income—Interest—Capital receipt or revenue receipt—If a casual and non-recurring nature—Estate duty wrongly collected from assessee—Proceedings for recovery in Court—Refund directed with interest on the amount—Receipt of interest—Statute awarding interest—Words "interest" in contrast to "principal sum adjudged" used—Revenue receipt and assessable under the Act—Non-recurring receipt—Lump sum payment on account of interest—Award under the decree from the date of institution of proceedings—Calculated as accruing* de die in diem*—Essential quality of recurrence borne—Casual receipt—Interest foreseen and anticipated—Not casual receipt even if not likely recur again*

*A*, a resident in India and having properties in India and Ceylon, had three wives and a son by the first wife On the death of the son in 1934 leaving his widow and on the death of *A* in 1938 leaving his two surviving widows, the Ceylon authority levied estate duty on the estates and ultimately, in the appeal before the Privy Council it was directed that the levy was bad and that the money collected should be refunded with interest The disputes arising on the death of *A* between the sons widow and the other widows were settled ultimately and each of the widows along with their respective adopted sons became entitled to a third share of the estate The assessee, the adopted son taken by the third wife of *A*, was assessed in the status of a Hindu undivided family, for the assessment year 1958-59, objected to the inclusion of a sum of Rs 1,93,328 received by him as his share of the amount of interest paid by the Ceylon Estate Duty Authority, on the ground that it was not a revenue receipt and even if it was so, it was a casual and non-recurring receipt The Revenue, the Tribunal and the High Court in reference rejected the contention The assessee appealed :

*Held*, that the interest paid to the assessee on the amount of estate duty directed to be refunded, is income liable to be taxed under the Indian Income-tax Act The receipt cannot be termed a casual or non-recurring one

Section 192 of the Ceylon Ordinance II of 1889, corresponding to section 34 of the Civil Procedure Code, in India, expressly uses the word "interest" in contrast to "principal sum adjudged" and there is no reason why the expression should not be given the natural meaning it bears When interest had been awarded under this statutory provision, there is no warrant for holding that the interest awarded should be taken to be a capital receipt being in the nature of damages for wrongful retention of money The real question in cases of this type was not whether the amount received was interest proper or damages but whether it had the quality of income or it was a capital sums estimated in terms of interest

A receipt of lump sum payment on account of interest does not necessarily mean that the amount of interest is not a receipt of a recurring nature Where the interest was granted under a decree of the Court from the date of the institution of proceedings in the lower Court and was calculated

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* C A No 728 of 1965. 27th October, 1966.

upon the footing that it accrued *de die in diem*, it has the essential quality of recurrence which is sufficient to bring it within the scope of the Act

The expression "casual" is not defined in the Act and construed in its plain and ordinary sense, according to the dictionary means "subject to or produced by chance, accidental, fortuitous; coming at uncertain times, not to be calculated on, unsettled" A receipt of interest which is foreseen and anticipated cannot be regarded as casual even if it is not likely to recur again

The contention of the assessee that the disputed sum was received as a share of the estate of the deceased, therefore it was a capital receipt was not allowed to be raised since the question did not arise out of the order of the Tribunal, and hence not decided in the Reference by the High Court

Appeal by Special Leave from the Judgment and Order dated the 24th September, 1962, of the Madras High Court in T C No 144 of 1960 *

*A K. Sen*, Senior Advocate (*R. Ganapathy Iyer*, Advocate, with him), for Appellant.

*B Sen*, Senior Advocate (*A. N Kirpal* and *R. N Sachthey*, Advocates, with him), for Respondent

The Judgment of the Court was delivered by

*Ramaswami, J*—This appeal is brought by Special Leave on behalf of Ramanathan Chettiar (hereinafter called the "assessee") from the judgment of the High Court of Madras dated 24th September, 1962 in T C No. 144 of 1960

Arunachalam Chettiar (senior) was a resident of Devakottai, Ramanathapuram District, who owned extensive properties including properties in Ceylon He married three wives, *viz*, Valami Achi, Lakshmi Achi and Nachiar Achi Valami Achi died in 1913 leaving behind her a son Arunachalam Chettiai (junior) and three daughters. Lakshmi Achi and Nachiar Achi did not have natural born sons Arunachalam Chettiar (junior) died on 9th July, 1934 Arunachalam Chettiar (senior) died on 23rd February, 1938 He was survived by his two widows Lakshmi Achi and Nachiar Achi and by the widow of his predeceased son, Arunachalam Chettiar (junior) *viz.*, Umayal Achi After the death of Arunachalam Chettiar (senior) disputes arose between his two widows and the widow of Arunachalam Chettiar (junior) Umayal Achi, in respect of the estate of Arunachalam Chettiar (senior) Umayal Achi filed O S No 93 of 1938 in the Subordinate Judge's Court of Devakottai for administration and partition of the estate of deceased Arunachalam Chettiar (senior) She claimed a half share in the properties under the provisions of the Hindu Women's Rights to Property Act During the pendency of the suit the Subordinate Judge appointed two Advocates as Receivers for the administration of the estate On the death of Arunachalam Chettiar (junior) the Estate Duty Authorities of Ceylon levied estate duty on what was described as the "deceased's half-share of the assets of the business carried on by the family in Ceylon" Estate duty was also levied on the death of Arunachalam Chettiar (senior) in 1938 The two Advocate-Receivers who were administering the estate paid under protest to the Commissioner of Estate Duty in Ceylon the estate duty claimed from them The administrators subsequently filed a suit in the Court of the District Judge, Colombo, questioning the validity of the estate duties The District Judge, upheld the levies, but the Supreme Court of Ceylon allowed the appeal of the administrators and ordered the refund of the estate duty together with interest The Attorney-General of Ceylon took the matter in appeal to the Judicial Committee in P C A Nos 16 and 17 of 1955. By its judgment dated 10th July, 1957 the Judicial Committee affirmed the judgment of the Supreme Court of Ceylon and dismissed the appeals In consequence of this decision the Estate Duty Authorities of Ceylon had to refund a sum of Rs 7,97,072 as interest payable on the amount of estate duty formerly collected Meanwhile, the litigation in O S No 93 of 1938 filed in the Subordinate Judge's Court of Devakottai had also reached the Judicial Committee and at that stage the parties compromised. In pursuance of this compromise the two widows of Arunachalam Chettiar (senior) took a boy each in adoption on 17th June, 1945, Lakshmi Achi taking in adoption

* (1963) 2 M L J 438 · (1963) 2 I T J 358 . I L R (1963) Mad 546.

one Arunachalam Chettiar and Nachiar Achi taking in adoption one Ramanathan Chettiar. The widow of Arunachalam Chettiar (junior) Umayal Achi also adopted a son to her deceased husband, a boy called Veerappa Chettiar on 17th June, 1945 The estate was divided into three equal shares, Lakshmi Achi and her adopted son taking one-third share, Nachiar Achi and her adopted son taking another one-third share, and Umayal Achi and her adopted son Veerappa taking the balance of one-third share.

Ramanathan, the adopted son of Arunachalam Chettiar (senior) taken in adoption by Nachiar Achi was assessed to income-tax for the assessment year 1958-59, the relevant previous year being the year ending 31st March, 1958 He was assessed in the status of a Hindu undivided family on a total income of Rs 2,53,828 and a total tax of Rs 1,79,412 12 nP was levied The assessment included a sum of Rs. 1,93,328 which was received by the assessee as his share of the amount of interest paid by the Estate Duty Authorities of Ceylon consequent to the judgment of the Supreme Court of Ceylon ordering the refund of the amount The assessee objected to the inclusion of this amount on the ground that it was not a revenue receipt assessable to income-tax and that, in any event, the receipt was of a casual and non-recurring nature falling within the exemption under section 4 (3) (*vii*) of the Indian Income-tax Act, 1922 (hereinafter referred to as the "Act") The Income-tax Officer overruled the objection and his order was affirmed in appeal, by the Appellate Assistant Commissioner and by the Appellate Tribunal Before the Appellate Tribunal the assessee contended that the amount of Rs 1,93,328 received from the Estate Duty Authorities, Ceylon, was not income, but was only damages received for the unlawful retention of money, and even assuming that it was a revenue receipt, it was of a casual and non-recurring nature and, therefore, was not liable to assessment. The contentions of the assessee were overruled by the Appellate Tribunal. At the instance of the assessee the Appellate Tribunal referred the following questions of law to the High Court :

> "(1) Whether the aforesaid interest receipt constitutes income ?
>
> (2) If so, whether it is exempt under section 4 (3) (*vii*) of the Income-tax Act as a receipt of a casual and non-recurring nature ?"

By its judgment dated 24th September, 1962, the High Court answered the reference against the assessee and held that the receipt in question was a revenue receipt and could not be held to be receipt of a casual and non-recurring nature and the amount was rightly assessed in the year of assessment.

The first question to be considered in this appeal is whether the amount of Rs. 1,93,328 received by the assessee as his one-third share of the amount of interest paid by the Estate Duty Authorities of Ceylon can be taxed as income It was contended on behalf of the appellant that the amount constituted damages for unlawful retention of money by the Estate Duty Authorities of Ceylon and the amount received by the assessee was therefore capital receipt. We do not think there is any justification for this argument. The amount was paid by the Ceylon Estate Duty Authorities under the judgment and decree of the Supreme Court of Ceylon the relevant portion of which reads as follows :—

> "I would therefore, set aside the order under appeal and substitute a decree (*a*) declaring that no estate duty was payable under the Estate Duty Ordinance (Cap 187) in respect of the estate of Arunachalam Chettiar (senior) and (*b*) ordering the Crown to refund to the appellants the sum of Rs 7,00,402 65 with legal interest thereon from the date on which these proceedings were instituted in the District Court. The appellants are also entitled to their costs in this Court and in the Court below."

Under the provisions of the Estate Duty Act of Ceylon, as it stood at the material time, any person aggrieved by the assessment of estate duty could appeal to the appropriate District Court naming the Attorney-General as the respondent. After the Attorney-General is served in the matter the appeal is proceeded with as an action between the assessee as plaintiff and the Crown as defendant. The statute specifically provides that the provisions of the Civil Procedure Code and of the Stamp Ordinance shall apply to the proceeding. The petition of appeal should be

stamped as though it were a plaint filed for the purpose of originating the action, and if it is not stamped with the requisite stamps it may be dealt with in the same manner as if it is a plaint which is insufficiently stamped. Any party aggrieved by any decree or order of the District Court may further appeal to the Supreme Court in accordance with the provisions of the Civil Procedure Code The relevant provision under the Ceylon Civil Procedure Code, empowering the Court to award interest is contained in section 192 of Ordinance II of 1889 which is to the following effect :—

"When the action is for a sum of money due to the plaintiff, the Court may in the decree order interest according to the rate agreed on between the parties by the instrument sued on, or in the absence of any such agreement at the rate of nine per cent per annum to be paid on the principal sum adjudged from the date of the action to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the action, with further interest at such rate on the aggregate sum so adjudged from the date of the decree to the date of payment, or to such earlier date as the Court thinks fit . "

This provision corresponds to section 34 of the Civil Procedure Code, in India Section 192 of the Ceylon Ordinance II of 1889 expressly uses the word "interest" in contrast to "principal sum adjudged" and we do not see any reason why the expression should not be given the natural meaning it bears In its judgment dated 12th October, 1953, the Supreme Court of Ceylon acted under this section and ordered the Crown to refund to the appellant the sum of Rs. 7,00,402 65 with legal interest thereon from the date of the institution of the proceedings in the District Court. We see no warrant for accepting the submission of the appellant that the interest awarded by the Supreme Court of Ceylon under section 192 of Ordinance II of 1889 should be taken to be a capital receipt being in the nature of damages for wrongful retention of money In *Westminster Bank, Ltd* v. *Riches*[1], the question at issue was whether the amount of interest awarded by the Court in exercise of its discretionary power under section 3 of the Law Reform (Miscellaneous Provisions) Act, 1934 was "interest on money" within the meaning of Schedule 'D' and General Rule 21 of the Income-tax Act, 1918 and whether income-tax was accordingly deductible therefrom It was contended in that case on behalf of the respondent that the amount though awarded under a power to add interest to the amount of debt and though called interest in the judgment, was not really interest such as attracts income-tax but was damages This argument was rejected by the House of Lords and it was held that there was no incompatibility between the two conceptions, and that the amount was taxable as interest on money within Schedule 'D' and General Rule 21 of the Income-tax Act, 1918. It was pointed out that the real question in cases of this type was not whether the amount received was interest proper or damages but whether it had the quality of income or it was a capital sum estimated in terms of interest In the course of his judgment, Lord Wright observed at page 189 of the Report as follows :—

"The contention of the appellant may be summarily stated to be that the award under the Act cannot be held to be interest in the true sense of that word because it is not interest but damages, that is, damages for the detention of a sum of money due by the respondents to the appellant, and hence the deduction made as being required under rule 21 is not justified because the money was not interest In other words the contention is that money awarded as damages for the detention of money is not interest and has not the quality of interest Evershed, J, in his admirable judgment, rejected that distinction The appellant's contention is in any case artificial and is, in my opinion, erroneous, because the essence of interest is that it is a payment which becomes due because the creditor has not had his money at the due date It may be regarded either as representing the profit he might have made if he had had the use of the money, or conversely the loss he suffered because he had not that use The general idea is that he is entitled to compensation for the deprivation From that point of view it would seem immaterial whether the money was due to him under a contract express or implied or a statute, or whether the money was due for any other reason in law In either case the money was due to him and was not paid or in other words, was withheld from him by the debtor after the time when payment should have been made, in breach of his legal rights, and interest was a compensation, whether the compensation was liquidated under an agreement or statute, as for instance under section 57 of the Bills of Exchange Act, 1882, or was unliquidated and claimable under the Act as in the present case The essential quality of the claim for compensation is the same and the compensation is properly described as interest."

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1. (1947) 1 All E.R. 469 : L R. (1947) A.C. 390 : 28 T.C. 159.

This passage was quoted with approval by this Court in *Dr. Shamlal Narula* v. *Commissioner of Income-tax, Punjab, Jammu & Kashmir, Himachal Pradesh and Patiala*[1], in which a question arose whether the statutory interest paid under section 34 of the Land Acquisition Act, 1894, on the amount of compensation awarded for the period from the date the Collector has taken possession of land compulsorily acquired is interest paid for the delayed payment of the compensation and is therefore a revenue receipt liable to tax under the Act. It was held that the amount was not compensation for land acquired or for depriving the claimant of his right to possession but was paid to the claimant for the use of his money by the State and the statutory interest paid was, therefore, a revenue receipt liable to income-tax The principle of this decision applies to the present case also and we are of opinion that the interest paid to the assessee under the decree of the Supreme Court of Ceylon on the amount of estate duty directed to be refunded was income liable to be taxed under the Act.

We shall proceed to consider the next question whether the receipt of interest, even if it constituted income, was exempt under section 4 (3) (vii) of the Act as receipt of a casual and non-recurring nature. Section 4 (3) (vii) of the Act is in the following terms :—

"4 (3) Any income, profits or gains falling within the following classes shall not be included in total income of the person receiving them :

* * * * * * *

(vii) Any receipts not being capital gains chargeable according to the provisions of section 12-B and not being receipts arising from business or the exercise of a profession, vocation or occupation, which are of a casual and non-recurring nature, or are not by way of addition to the remuneration of an employee "

It was argued on behalf of the appellant that the amount in question was a lump sum payment awarded under the decree of the Court and there was no quality of recurrence about it. We do not think that this submission is correct. It is true that the appellant received lump sum payment on account of interest That does not, however, necessarily mean that the amount of interest is not a receipt of a recurring nature. On the other hand, the interest was granted under the decree of the Court from the date of the institution of the proceedings in the District Court and was calculated upon the footing that it accrued *de die in diem*, and hence it has the essential quality of recurrence which is sufficient to bring it within the scope of the Act. It was also contended that the receipt of interest was casual in its character. The expression "casual" has not been defined in the Act and must therefore be construed in its plain and ordinary sense According to the Shorter Oxford English Dictionary the word "casual" is defined to mean . " (i) Subject to or produced by chance , accidental, fortuitous, (ii) Coming at uncertain times ; not to be calculated on, unsettled ". A receipt of interest which is foreseen and anticipated cannot be regarded as casual even if it is not likely to recur again When the action was commenced by way of a petition in the District Court of Ceylon, it was well within the contemplation and anticipation of the persons representing the estate that a successful termination of the action would not merely result in a decree for the tax illegally collected, but would also make the Crown liable to pay interest on that amount from the date of the petition till the date of the payment. The receipt of interest in the present case by virtue of the decree of the Supreme Court of Ceylon bears no semblance, therefore, to a receipt of a casual character It is not therefore possible to accept the argument of the appellant that the receipt of interest obtained under the decree of the Supreme Court of Ceylon was of a casual or non-recurring nature We accordingly reject the submission of the appellant on this aspect of the case

It was lastly submitted on behalf of the appellant that the payment of interest under the decree of the Supreme Court of Ceylon was made by the Ceylon Estate Duty Authorities to the estate of Arunachalam Chettiar (senior) and what was received by the appellant for his one-third share, namely, Rs 1,93,328 was a share in the

1. (1964) 2 I.T.J 143 : (1964) 2 S C J 345 : (1964) 53 I.T.R 151.

estate of the deceased and therefore was received by the appellant as part of the estate. In other words, the contention of the appellant was that the receipt was a capital receipt and was not assessable in his hands. It is not, however, open to the appellant to advance this argument at this stage because the question did not arise out of the order of the Tribunal and no such question was referred by the Appellate Tribunal for the decision of the High Court Mr A K Sen for the appellant also referred to the decision of the Madras High Court in *Commissioner of Income-tax, Madras* v *Veerappa Chettiar*[1], which dealt with a share of the same income by another branch of the family It was decided by the Madras High Court in that case that the receipt of interest prior to 17th February, 1947 should be regarded as capital and the rest should be regarded as income receipt. But the question of the disruption of the status of joint family on 17th February, 1947 and the effect of that disruption upon the character of the interest receipt was never raised before the Appellate Tribunal and was not decided by it in the appeal before us In *Commissioner of Income-tax, Bombay* v. *Scindia Steam Navigation Co, Ltd.*[2] it was pointed out by this Court that in hearing a reference under section 66 of the Act the High Court acts purely in an advisory capacity, and it is of the essence of such a jurisdiction that the Court can decide only questions which are referred to it and not any other questions. In the present case, the High Court has rightly pointed out that the question did not arise out of the order of the Tribunal and was not the subject-matter of reference to the High Court.

For the reasons already expressed we hold that the judgment of the High Court is right and this appeal must be dismissed with costs

V.S ——— *Appeal dismissed.*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—K. SUBBA RAO, J. R. MUDHOLKAR AND R. S. BACHAWAT, JJ.

Sarangadeva Periya Matam and another .. *Appellants**

*v.*

Ramaswami Goundar (dead) by legal representatives .. *Respondents.*

*Limitation Act (IX of 1908), section 28 and Article 144—Perpetual lease, without legal necessity, of properties belonging to a math by its matadhipathi—Lessee ceasing to pay rent after the death of the matadhipathi granting the lease and possessing the demised properties on his own behalf—Adverse possession against the math when commences—If commences only from the date of appointment of a successor matadhipathi.*

Under Article 144 of the Limitation Act, 1908, limitation for a suit by a math or by any person representing it, for possession of immovable properties belonging to it, runs from the time when the possession of the defendant becomes adverse to the plaintiff The math is the owner of the endowed property. Like an idol, the math is a juristic person having the power of acquiring, owning and possessing properties and having the capacity of suing and being sued Being an ideal person, it must of necessity act in relation to its temporal affairs through human agency It may acquire property by prescription and may likewise lose property by adverse possession If the math while in possession of its property is dispossessed or if the possession of a stranger becomes adverse, it suffers an injury and has the right to sue for the recovery of the property If there is a legally appointed matadhipathi, he may institute the suit on its behalf, if not, the *de facto* matadhipathi may do so and where necessary, a disciple or other beneficiary of the math may take steps for vindicating its legal rights by the appointment of a receiver having authority to sue on its behalf or by the institution of a suit in its name by a next friend appointed by the Court With due diligence, the math or those interested in it may avoid the running of time The running of limitation against the math under Article 144 is not suspended by the absence of a legally appointed matadhipathi , clearly, limitation would run against it where it is managed by a *de facto* matadhipathi and it would run equally if there is neither a *de jure* nor a *de facto* matadhipathi.

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*C A. No 544 of 1963. 23rd September, 1965.

The office of a matadhipathi carries with it the right to manage and possess the endowed properties on behalf of the math and the right to sue on its behalf for the protection of those properties During his office, the matadhipathi has also large beneficial interests in the math properties. But by virtue of his office, he can possess and enjoy only such properties as belong to the math If before his appointment limitation under Article 144 of the Limitation Act has commenced to run against the math, the appointment does not give either the math or the matadhipathi a new right of suit for a fresh starting point of limitation under that Article for recovery of the property

In the absence of legal necessity, a matadhipathi has no power to grant a perpetual lease of the math properties at a fixed rent. Such a lease granted without legal necessity will not endure beyond the lifetime of the matadhipathi granting the lease

Where, therefore, a matadhipathi of a math grants, without legal necessity, a perpetual lease of the math properties for a fixed rent and after his death the lessee ceases to pay any rent and possesses the properties on his own behalf, adverse possession of the demised properties commences to run against the math on the death of the matadhipathi who granted the lease Consequently, limitation under section 28 read with Article 144 of the Limitation Act, 1908, for a suit to recover such properties begins to run from the date of the death of the matadhipathi granting the lease, the running of time will not be suspended till a successor to the deceased matadhipathi is appointed

Appeal by Special Leave from the Judgment and Decree dated the 16th July, 1959, of Madras High Court in Second Appeal No. 513 of 1957.

*A. V. Viswanatha Sastri*, Senior Advocate (*S. S. Javali* and *R. Ganapathy Iyer*, Advocates, with him), for Appellants.

*R. K. Garg, S. C. Agarwal, D. P. Singh* and *M. K Ramamurthi*, Advocates, of *M/s. Ramamurthi & Co.*, for Respondents.

The Judgment of the Court was delivered by

*Bachawat, J*—Shri Sarangadeva Periya Matam of Kumbakonam was the inamholder of lands in Kannibada Zamin, Dindigul Taluk, Madurai District. In 1883, the then matadhipathi granted a perpetual lease of the melwaram and kudiwaram interest in a portion of the inam lands to one Chinna Gopiya Gounder, the grandfather of the plaintiff-respondent on an annual rent of Rs. 70 The demised lands are the subject-matter of the present suit Since 1883 until January, 1950 Chinna Gopiya Goundar and his descendants were in uninterrupted possession and enjoyment of the suit lands. In 1915, the matadhipathi died without nominating a successor. Since 1915, the descendants of Chinna Gopiya Goundar did not pay any rent to the math Between 1915 and 1939 there was no matadhipathi One Basavan Chetti was in management of the math for a period of 20 years from 1915. The present matadhipathi was elected by the disciples of the math in 1939 In 1928, the Collector of Madurai passed an order resuming the inam lands, and directing full assessment of the lands and payment of the assessment to the math for its upkeep. After resumption, the lands were transferred from the "B" Register of inam lands to the "A" Register of ryotwari lands and a joint patta was issued in the name of the plaintiff and other persons in possession of the lands The plaintiff continued to possess the suit lands until January, 1950 when the math obtained possession of the lands. On 18th February, 1954, the plaintiff instituted the suit against the math represented by its present matadhipathi and an agent of the math claiming recovery of possession of the suit lands. The plaintiff claimed that he acquired title to the lands by adverse possession and by the issue of a ryotwari patta in his favour on the resumption of the inam. The Subordinate Judge of Dindigul accepted the plaintiff's contention, and decreed the suit On appeal, the District Judge of Madurai set aside the decree and dismissed the suit. On Second Appeal, the High Court of Madras restored the judgment and decree of the Subordinate Judge. The defendants now appeal to this Court by Special Leave. During the pendency of the appeal, the plaintiff-respondent died and his legal representatives have been substituted in his place.

The plaintiff claimed title to the suit lands on the following grounds. (1) Since 1915 he and his predecessors-in-interest were in adverse possession of the lands,

and on the expiry of 12 years in 1927 he acquired prescriptive title to the lands under section 28 read with Article 144 of the Indian Limitation Act, 1908, (2) by the resumption proceedings and the grant of the ryotwari patta a new tenure was created in his favour and he acquired full ownership in the lands , and (3) in any event, he was in adverse possession of the lands since 1928, and on the expiry of 12 years in 1940 he acquired prescriptive title to the lands, under section 28 read with Article 134-B of the Indian Limitation Act, 1908. We are of the opinion that the first contention of the plaintiff should be accepted, and it is, therefore not necessary to consider the other two grounds of his claim.

In the absence of legal necessity, the previous matadhipathi had no power to grant a perpetual lease of the math properties at a fixed rent Legal necessity is neither alleged nor proved. But the matadhipathi had power to grant a lease which could endure for his lifetime. The lease of 1883, therefore, endured during the lifetime of the previous matadhipathi and terminated on his death in 1915. Since 1915, the plaintiff and his predecessors-in-interest did not pay any rent to the math, and they possessed the lands on their own behalf adversely to the math. Before the insertion of Article 134-B in the Indian Limitation Act, 1908 by Act I of 1929, the suit for recovery of the lands from the defendants would have been governed by Article 144. The controversy is about the starting point of limitation of a suit for the recovery of the math properties under Article 144 Did the limitation commence on the date of the death of the previous matadhipathi, or did it commence on the date of election of the present matadhipathi?

On behalf of the appellants, Mr. Ganapathy Iyer contended that the right to sue for the recovery of the math properties vests in the legally appointed matadhipathi and adverse possession against him cannot run until his appointment. In support of his contention, he relied upon the minority judgment of a Full Bench of the Madras High Court in *Venkateswara* v *Venkatesa*[1], *Kameswara Rao* v. *Somanna*[2], and *Manikkam Pillai* v. *Thanikachalam Pillai*[3] He argued that this view has received legislative sanction in Article 96 of the Indian Limitation Act, 1963 He relied upon the following observations in *Jagadindra Nath Roy* v. *Hemanta Kumari Debi*[4].

> "The possession and management of the dedicated property belongs to the shebait And this carries with it the right to bring whatever suits are necessary for the protection of the property. Every such right of suit is vested in the shebait and not in the *idol*"

Relying on *Murray* v. *The East India Company*[5] and *Meyappa Chetty* v *Supramanian Chetty*[6], and several decisions under Articles 120 and 110 of the Indian Limitation Act, 1910, he submitted that the cause of action does not accrue and time does not commence to run unless there is someone who can institute the suit. Reliying on *Radhamoni Devi* v. *Collector of Khulna*[7] and *Srischandra Nandy* v. *Baijnath Jugal Kishore*[8], he contended that before possession can be adverse there must be a competitor who by due vigilance could avoid the running of time.

Mr. Garg on behalf of the respondents contended that adverse possession commenced to run against the math on the death of the matadhipathi who granted the lease and the operation of the Limitation Act is not affected by the fact that there was no legal manager of the math. In support of his contention, he relied upon the majority judgment of the Full Bench of the Madras, High Court in *Venkateswara's case*[1], *Manmohan Haldar* v. *Dibbendu Prosad Ray Chaudhuri*[9] and *Administrator-General of Bengal* v. *Balkissen Misser*[10]. Relying on *Pramatha Nath Mullick* v. *Pradyumna Kumar Mullick*[11], he submitted that a math, like an idol, has a juridical status with the power of suing and being sued. He argued that in the absence of a legally appointed matadhipathi, a *de facto* manager could institute a

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1. I L R 1941 Mad 599 (1941) 1 M L J 644: A I R 1941 Mad 449 (F B)
2. (1954) 2 M L J (Andhra) 228 A I R 1955 Andh Pra 212
3. A I R 1917 Mad 706, 706 (1).
4. (1904) I L R 32 Cal 129, 141
5. (1821) 5 B & All 204, 217.
6. (1916) L R 43 I A 113, 120.
7. (1900) L R 27 I A 136
8. I L R 14 Pat 327 P C
9. I L R (1949) 2 Cal 263
10. (1924) I L R 51 Cal 953, 957-960
11. 49 M L J 30 L R 52 I A 245, 250 : A I R 1925 P.C 139.

suit for recovery of the math properties, and the beneficiaries of the endowment could take appropriate steps for the recovery, and, in any event, the mere absence of machinery for the institution of the suit would not suspend the running of limitation.

We are inclined to accept the respondent's contention. Under Article 144 of the Indian Limitation Act, 1908, limitation for a suit by a math or by any person representing it for possession of immovable properties belonging to it runs from the time when the possession of the defendant becomes adverse to the plaintiff. The math is the owner of the endowed property. Like an idol, the math is a juristic person having the power of acquiring, owning and possessing properties and having the capacity of suing and being sued. Being an ideal person, it must of necessity act in relation to its temporal affairs through human agency. See *Babajirao* v. *Laxmandas*[1]. It may acquire property by prescription and may likewise lose property by adverse possession. If the math while in possession of its property is dispossessed or if the possession of a stranger becomes adverse, it suffers an injury and has the right to sue for the recovery of the property. If there is a legally appointed matadhipathi, he may institute the suit on its behalf; if not, the *de facto* matadhipathi may do so, see *Mahadeo Prasad Singh* v. *Karia Bharti*[2]; and where, necessary, a disciple or other beneficiary of the math may take steps for vindicating its legal rights by the appointment of a receiver having authority to sue on its behalf, or by the institution of a suit in its name by a next friend appointed by the Court. With due diligence, the math or those interested in it may avoid the running of time. The running of limitation against the math under Article 144 is not suspended by the absence of a legally appointed matadhipathi; clearly, limitation would run against it where it is managed by a *de facto* matadhipathi, see *Vithalbowa* v. *Narayan Daji Thite*[3], and we think it would run equally if there is neither a *de jure* nor a *de facto* mathadhipathi.

A matadhipathi is the manager and custodian of the institution. See *Vidya Varuthi Thirtha* v. *Balusami Ayyar*[4]. The office carries with it the right to manage and possess the endowed properties on behalf of the math and the right to sue on its behalf for the protection of those properties. During the tenure of his office, the matadhipathi has also large beneficial interests in the math properties. See *The Commissioner, Hindu Religious Endowments, Madras* v. *Sri Lakshmindra Thirtha Swamiar of Srirur Mutt*[5]. But by virtue of his office, he can possess and enjoy only such properties as belong to the math. If the title of the math to any property is extinguished by adverse possession, the rights of all beneficiaries of the math in the property are also extinguished. On his appointment, the matadhipathi acquires no right to recover property which no longer belongs to the math. If before his appointment limitation under Article 144 has commenced to run against the math, the appointment does not give either the math or the matadhipathi a new right of suit or a fresh starting point of limitation under that Article for recovery of the property. In the instant case, the present matadhipathi was elected in 1939 when the title of the math to the suit lands was already extinguished by adverse possession. By his election in 1939 the present matadhipathi could not acquire the right to possess and enjoy or to recover properties which no longer belonged to the math.

In *Jagadindra Nath Roy's case*[6], the dispossession of the idol's lands took place in April, 1876. The only shebait of the idol was then a minor, and he sued for recovery of the lands in October, 1889 within three years of his attaining majority. The Privy Council held that the plaintiff being a minor at the commencement of the period of limitation was entitled to the benefit of section 7 of the Indian Limitation Act (XV of 1877) corresponding to section 6 of the Indian Limitation

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1 (1904) I L R 28 Bom 215, 223

2 (1934) 68 M L J 499 L R 62 I A 47, 51. A I R. 1935 P C 44

3 (1893) I L R 18 Bom 507, 511

4 (1921) L R 48 I A 302 at 311, 315 I.L R 44 Mad 831. 41 M L J 346 A I R. 1922 P C 123

5 (1954) S C J 335 (1954) 1 ML J 596: (1954) S C R 1005, 1008-1020 A I R 1954 S C. 282

6 (1904) I L R 32 Cal 129

Act, 1908 and was entitled to institute the suit within three years of his coming of age. This decision created an anomaly, for, as pointed out by Page, J., in *Administrator-General of Bengal* v. *Balkissen Missei*[1], in giving the benefit of section 7 of the Indian Limitation Act, 1877 to the shebait, the Privy Council proceeded on the footing that the right to sue for possession is to be divorced from the proprietary right to the property which is vested in the idol. We do not express any opinion one way or the other on the correctness of *Jagadindra Nath Roy's case*[2] For the purposes of this case, it is sufficient to say that we are not inclined to extend the principle of that case In that case, at the commencement of the period of limitation there was a shebait in existence entitled to sue on behalf of the idol, and on the institution of the suit he successfully claimed that as the person entitled to institute the suit at the time from which the period is to be reckoned, he should get the benefit of section 7 of the Indian Limitation Act, 1877 In the present case, there was no matadhipathi in existence in 1915 when limitation commenced to run Nor is there any question of the minority of a matadhipathi entitled to sue in 1915 or of applying section 6 of the Indian Limitation Act, 1908.

For these reasons, we hold that the time under Article 144 of the Indian Limitation Act, 1908 commenced to run in 1915 on the death of the matadhipathi, who granted the lease, and the absence of a legally appointed matadhipathi did not prevent the running of time under Article 144. We, therefore, agree with the answer given by the majority of the Judges to the third question referred to the Full Bench of the Madras High Court in *Venkateswara's case*[3]. We express no opinion on the interpretation of Article 134-B of the Indian Limitation Act, 1908 or Article 96 of the Indian Limitation Act, 1963 Under Article 96 of the Indian Limitation Act, 1963, the starting point of limitation in such a case would be the date of the appointment of the plaintiff as manager of the endowment, but this Article cannot be considered to be a legislative recognition of the law existing before 1929.

We hold that by the operation of Article 144 read with section 28 of the Indian Limitation Act, 1908 the title of the math to the suit lands became extinguished in 1927, and the plaintiff acquired title to the lands by prescription He continued in possession of the lands until January, 1950 It has been found that in January, 1950 he voluntarily delivered possession of the lands to the math, but such delivery of possession did not transfer any title to the math. The suit was instituted in 1954 and is well within time.

In the result, the appeal is dismissed with costs.

V.K. *Appeal dismissed.*

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1 (1924) I L R. 51 Cal 953 at 958
2 (1904) I L R 32 Cal 129
3 (1941) 1 M L J 644 I L R (1941) Mad 599 A I R 1941 Mad 449 at pp 614, 615, 633 634 (F B )

* C A No 641 of 1965 5th November, 1966.

# THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—V. RAMASWAMI, V BHARGAVA AND RAGHUBAR DAYAL, JJ.

Shivanarayan Kabra .. *Appellant**

*v.*

State of Madras .. *Respondent.*

*Penal Code* (*XLV of* 1860), *section* 420—*Conviction under*—*False pretence in express words not necessary.*

*Forward Contracts* (*Regulation*) *Act* (*LXXIV of* 1952), *sections* 2 (*c*) *and* 15—*Scope*—*Speculative contracts*—*If falls within the purview of the Act*

*Contract*—Pucci adat *system of the Bombay market*—*Incidents*—*Status of* pucca adatia

*Criminal Procedure Code* (*V of* 1898), *sections* 361 (1), 537 *and* 239—*Contravention of section* 361 (1)—*But no prejudice caused*—*Trial not vitiated*—*Several items of cheating part and parcel of one transaction*—*Trial on a single charge*—*Validity*

For a conviction under section 420 of the Penal Code it is not necessary that a false pretence should be made in express words It may be inferred from all the circumstances including the conduct of the accused in obtaining the property.

The argument that to forward contracts which are not really meant for actual delivery of goods at a future date but which are only speculative in character the Forward Contracts (Regulation) Act does not apply, is untenable If the expression "forward contract" in section 2 (*c*) of the Act is not construed so as to include speculative contracts which ostensibly are for delivery of goods, the provisions of the Act would be rendered nugatory It is a sound rule of interpretation that a statute should be so construed as to prevent the mischief and to advance the remedy according to the true intention of the makers of the statute In construing therefore section 2 (*c*) and in determining its true scope, it is permissible to have regard to all such factors as can legitimately be taken into account in ascertaining the intention of the Legislature, such as the history of the statute, the reason which led to its being passed, the mischief which it intended to suppress and the remedy provided

The Forward Contracts (Regulation) Act, 1952, was passed in order to put a stop to undesirable forms of speculation in forward trading in the wide interests of the community and in particular, the interests of the consumers for whom adequate safeguards were essential Speculative contracts are therefore included within the purview of the Act

It is well-established that the *pucca adatia* has no authority to pledge the credit of the upcountry constituent to the local merchant and there is no privity of contract as between the upcountry constituent and the local merchant The *pucca adatia* is entitled to substitute his own goods towards the contract made for the principal and buy the principal's goods on his personal account. In other words, the *pucca adatia* is not the agent of his constituent but he is acting as a principal as regards his constituent and not as a disinterested middleman to bring two principals together

A breach of the requirement of section 361 (1) of the Criminal Procedure Code is a mere irregularity and would not vitiate the trial unless prejudice is caused to the accused thereby When the irregularity has not resulted in any injustice the provisions of section 537 of the Criminal Procedure Code are applicable to cure the defect

When several items of cheating were part and parcel of one transaction, a trial of the accused on a single charge would be permissible under section 239 of the Criminal Procedure Code.

Appeal by Special Leave from the Judgment and Order dated the 16th July, 1963 of the Madras High Court in Criminal Revision Case No. 1139 of 1961 (Criminal Revision Petition No 1095 of 1961).

*Naunit Lal,* Advocate, for Appellant.

*A. V. Rangam,* Advocate, for Respondent.

The Judgment of the Court was delivered by

*Ramaswami, J*—This appeal is brought, by Special Leave, from the judgment of the Madras High Court dated 16th July, 1963 in Criminal Revision Case No. 1139 of 1961.

* Crl A. No 20 of 1964 23rd August, 1966.

The appellant was charged for having committed offences under section 420, Indian Penal Code and section 21 (*d*) and (*e*) of the Forward Contracts (Regulation) Act, 1952 (LXXIV of 1952), hereinafter called the "Act", with regard to certain transactions between the appellant and P.W. 2, Rajam. The appellant was convicted of all the charges and was sentenced to rigorous imprisonment for one year and a fine of Rs. 1,000 under section 420, Indian Penal Code and a fine of Rs. 100 under each of clauses (*d*) and (*e*) of section 21 of the Act by the District Magistrate, Kumbakonam. He further directed that a sum of Rs 1,000 out of the said fine should be paid to P.W. 2. On appeal, the convictions and sentences were affirmed by the Sessions Judge, West Thanjavur. The appellant took the matter in revision to the Madras High Court but the revision application was dismissed.

The appellant was the proprietor of a firm in Bombay known as "Jawarmal Gulab Chand". He advertised that people could invest capital in cotton, oil seeds and other commodities and that J. G. Market Reports issued by him could help them in the matter. P W. 2, a wholesale merchant dealing in cotton seed, groundnut cakes, etc , at Kumbakonam became a subscriber to the reports. P W. 2 asked the appellant for his business terms. The appellant sent him Exhibit P-30 wherein he stated that he undertook export, import, ready and forward business in various commodities in accordance with *pucca adatia* system and according to the usual practice and usage of the various associations concerned Neither the appellant nor his firm was a member of any recognised association within the meaning of the Act. P.W. 2 placed orders with the appellant and correspondence and statements of accounts were exchanged between the appellant and P W 2 who paid a sum of Rs 12,000 as margin Subsequent to the demand of P W. 2 the appellant sent Rs 1,000 and also a final statement showing loss in the transaction and claiming that a sum of Rs. 398-52 P was due to the appellant. According to the prosecution case, the appellant induced P.W. 2 to send him Rs. 12,000 between 1st May, 1958 and 15th June, 1958 for forward contract business in cotton, castor-seeds and groundnut by a fraudulent representation that the appellant conducted such business even though he was not actually entitled to do any such business and thereby cheated P.W. 2. The case of the appellant was that he could do business under the *pucca adatia* system with members of recognised associations like the Bombay Oil-seeds and Oil Exchange, and the East India Cotton Association, Bombay though he himself was not a member of either of these associations. The appellant denied that he made any false representation or that he induced P W 2 to part with his money. The case of the appellant was rejected by the District Magistrate of Kumbakonam who accepted the prosecution case as true and convicted and sentenced the appellant on all the charges The decision of the District Magistrate was affirmed by the Sessions Judge, West Thanjavur in appeal.

It was argued in the first place, on behalf of the appellant that on the admitted or proved facts no case of cheating has been made out against the appellant and therefore his conviction under section 420, Indian Penal Code was illegal We are unable to accept this argument as correct It has been found that the appellant sent a letter, Exhibit P-34 along with a copy of the business terms, Exhibit 34 (*a*) "on which we undertake business of our clients". In this document the appellant has made the representation that he could do business in forward contracts in cotton, grains, seeds, bullion, black pepper, etc., in accordance with the *pucca adatia* system and "in accordance with the usual practice and usage of the various associations concerned". In Exhibit P-33 the appellant sent a telegram to P W 2 intimating that "buying is advisable for quick profits". The appellant knew fully well that he had no right to do forward business and that he was not a member of any recognised association and that he could not lawfully advertise to P W 2 for investment in forward contracts It is not necessary that a false pretence should be made in express words by the appellant. It may be inferred from all the circumstances including the conduct of the appellant in obtaining the property and in Exhibit P-34 (*a*) the appellant stated something which was not true and concealed from P.W. 2 the fact that he was not a member of any recognised association and that he

was not entitled to carry on the forward contract business. It is clear that P.W. 2 would not have parted with the sum of Rs. 12,000 but for the inducement contained in Exhibit P-34 and the representation of the appellant that he could lawfully carry on forward contract business.

It was then submitted on behalf of the appellant that the forward contract in the present case was a wagering contract and fell outside the purview of the Act and the provisions of section 15 of that Act were therefore not attracted to this case. In our opinion, there is no justification for this argument. Before setting out the statutory provisions it is desirable to indicate briefly the economic implications of forward trading in commodities, the need for the regulation of such trading and the mischief which the Act was intended to remedy. The expert committee, to which the Bill which became the Act was referred, explained in their Report the meaning of forward trading as follows :

" Forward trading involves speculation about the future, but not all forms of forward trading could be considered as either unnecessary or undesirable for the efficient functioning of anything but the most primitive economy . To the extent to which forward trading enables producers, manufacturers and traders to protect themselves against the uncertainties of the future, and enables all the relevant factors, whether actual or anticipated, local or international, to exercise their due influence on prices, it confers a definite boon on the community, because, to that extent, it minimises the risks of production and distribution and makes for greater stability of prices and supplies It thus plays a useful role in modern business At the same time, it must be admitted that this is an activity in which a great many individuals with small means and inadequate knowledge of the market often participate, in the hope of quick or easy gains and consequently, forward trading often assumes unhealthy dimensions, thereby increasing, instead of minimising, the risks of business There are forms of forward trading for example, options, which facilitate participation by persons with small means and inadequate knowledge . It is, therefore, necessary to eliminate certain forms of forward trading, and permit others under carefully regulated conditions, in order to ensure that, while producers, manufacturers and traders will have the facilities they need for the satisfactory conduct of their business the wider interests of the community, and particularly, the interests of consumers, will be adequately safeguarded against any abuse of such facilities by others "

It was with these objects that the provisions of the Act were enacted.

It is necessary at this stage to set out the relevant provisions of the Act. The object of the Act as stated in the Preamble is "to provide for the regulation of certain matters relating to forward contracts, the prohibition of options in goods and for matters connected therewith". Section 2 (*c*) of the Act defines a " forward contract " as a contract for the delivery of goods at a future date and which is not a ready delivery contract Section 2 (*i*) defines a " ready delivery contract " as a contract which provides for the delivery of goods and the payment of a price therefor, either immediately or within such period not exceeding eleven days after the date of the contract. The statute therefore makes a distinction between " ready delivery contracts " and " forward contracts ". Forward contracts are again divided into two categories " specific delivery contracts" and " non-transferable specific delivery contracts". " Specific delivery contracts" mean forward contracts which provide for actual delivery of specific goods at the price fixed during specified future period. " Non-transferable specific delivery contracts " are specific delivery contracts the rights or liabilities under which are not transferable. Section 15 of the Act confers power on the Government to issue notifications declaring illegal forward contracts with reference to such goods or class of goods and in such areas as may be specified. Section 15 states .

" 15 (1) The Central Government may, by notification in the Official Gazette, declare this section to apply to such goods or class of goods and in such areas as may be specified in the notification, and thereupon, subject to the provisions contained in section 18, every forward contract for the sale or purchase of any goods specified in the notification which is entered into in the area specified therein otherwise than between members of a recognised association or through or with any such member shall be illegal

(2) Any forward contract in goods entered into in pursuance of sub-section (1) which is in contravention of any of the bye-laws specified in this behalf under clause (*a*) of sub-section (3) of section 11 shall be void—

(i) as respects the rights of any member of the recognised association who has entered into such contract in contravention of any such bye-law, and also

(ii) as respects the rights of any other person who has knowingly participated in the transaction entailing such contravention

"

Section 17 authorises the Government to prohibit by notification any forward contract for the sale or purchase of any goods or class of goods to which the provisions of section 15 have not been made applicable. Section 18 exempts non-transferable specific delivery contracts from the operation of these sections. Section 21 relates to penalties and reads as follows.

"21 Any person who—

(a) ... ... ... ... ... ... ;

(b) ... ... ... ... ... ...

(c) ... ... ... ... ... ...

(d) not being a member of a recognised association, wilfully represents to, or induces, any person to believe that he is a member of a recognised association or that forward contracts can be entered into or made or performed, whether wholly or in part, under this Act through him, or

(e) not being a member of a recognised association or his agent authorised as such under the rules or bye-laws of such association, canvasses, advertises or touts in any manner, either for himself or on behalf of any other person, for any business connected with forward contracts in contravention of any of the provisions of this Act, or

... ... ... ... ... ...

shall, on conviction, be punishable—

(i) for a first offence, with imprisonment which may extend to two years, or with a fine of not less than one thousand rupees, or with both,

(ii) for a second or subsequent offence, with imprisonment which may extend to two years and also with fine, provided that in the absence of special and adequate reasons to the contrary to be mentioned in the judgment of the Court, the imprisonment shall be not less than one month and the fine shall be not less than one thousand rupees"

It was argued on behalf of the appellant that the contracts in this case were not really meant for delivery of goods but were speculative in character. It was contended that to a contract of this description the Act has no application Mr Naunit Lal argued that the words of section 2 (c) must be literally construed and must be taken to cover only those contracts in which the parties intended actual delivery of goods at a future date In our opinion, the interpretation for which Mr. Naunit Lal contends is against the whole scheme and purpose of the Act If the expression "forward contracts" in section 2 (c) is not construed so as to include speculative contracts which ostensibly are for delivery of goods the provisions of the Act would be rendered nugatory. It is a sound rule of interpretation that a statute should be so construed as to prevent the mischief and to advance remedy according to the true intention of the makers of the statute In construing therefore section 2 (c) of the Act and in determining its true scope it is permissible to have regard to all such factors as can legitimately be taken into account in ascertaining the intention of the Legislature, such as the history of the statute, the reason which led to its being passed, the mischief which it intended to suppress and the remedy provided by the statute for curing the mischief That was the rule laid down in *Heydon's case*[1], which was accepted by this Court in *The Bengal Immunity Company Limited* v. *The State of Bihar and others*[2]

As we have already pointed out, the Act was passed in order to put a stop to undesirable forms of speculation in forward trading and to correct the abuses of certain forms of forward trading in the wide interests of the community and, in particular, the interests of the consumers for whom adequate safeguards were essential. In our opinion, speculative contracts of the type covered in the present case are included within the purview of the Act One of the contracts in the present case is Exhibit P-42 in which P W 2 placed an order for supply of 100 bales of cotton jarilla to be delivered in August, 1958 at Rs 654 per candy We think that a contract of this description falls within the definition of "forward contract"

1 (1584) 3 W Rep 16 76 E R 637 168 (1955) 2 S C R. 603.
2 (1955) S C J 672 (1955) 2 M L J (S C.)

within the meaning of this Act and the provisions of that Act are therefore applicable to this case. We consider that Mr Naunit Lal has been unable to make good his submission on this aspect of the case

It was then contended for appellant that even if the Act was applicable there is no breach of the provisions of section 15 because the appellant placed his order for the goods covered by the contract through "a member of the recognised association" as contemplated in section 15 of the Act. The argument was stressed that the appellant was merely acting as an agent of P W. 2 and had placed an order for the notified goods through a member of the recognised association and there was no breach of any of the provisions of the Act. We are unable to accept this argument as correct In the first place, there is no evidence on the record of the case to show that the appellant placed the order for the notified goods with a member of the recognised association But even on the assumption that the appellant placed an order for the notified goods through a member of the recognised association there is, in our opinion, a breach of the provisions of the Act. The reason is that the appellant was doing forward contract business as a *pucca adatia* It is well-established that the *pucca adatia* has no authority to pledge the credit of the upcountry constituent to the Bombay merchant and there is no privity of contract as between the upcountry constituent and the Bombay merchant The *pucca adatia* is entitled to substitute his own goods towards the contract made for the principal and buy the principal's goods on his personal accounts In other words, the *pucca adatiya* is not the agent of his constituent but he is acting as a principal as regards his constituent and not as a disinterested middleman to bring two principals together The legal position has been explained by the Bombay High Court in *Bhagwandas Narotamdas* v. *Kanji Deoji*[1], and affirmed by the Judicial Committee in *Bhagwandas Parasram* v *Burjorji Ruttonji Bomanji*[2]. In the present case, therefore, the appellant was acting as principal to principal, so far as P W 2 was concerned and the contracts are hit by the provisions of section 15 of the Act

We pass on to consider the next contention of the appellant that there was a breach of section 361, Criminal Procedure Code, which states:

"361. (1) Whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open Court in a language understood by him

(2) If he appears by pleader and the evidence is given in a language other than the language of the Court, and not understood by the pleader, it shall be interpreted to such pleader in that language

. . . . . . . . . . . . . . . ."

It was said that the evidence of the prosecution witnesses was given either in Tamil or in the English language and the appellant did not know either of the languages and so he was not able to take part in the trial Mr. Naunit Lal contended that there was a breach of the requirement of section 361 (1), Criminal Procedure Code, and the trial was vitiated We do not think there is any substance in this argument. Even if it is assumed that the appellant did not know English or Tamil the violation of any provision of section 361 (1), Criminal Procedure Code, was merely an irregularity and it is not shown in this case that there is any prejudice caused to the appellant on this account It is pointed out by the Sessions Judge that the appellant did not make any objection at the time the evidence was given and it appears that he was represented by two eminent Advocates—Sri V. T Rangaswami Iyengar and Sri R Krishnamoorthy Iyer—in the trial Court who knew both these languages and who would not have allowed the interest of the appellant to be jeopardised even to the smallest extent In our opinion, the irregularity has not resulted in any injustice and the provisions of section 537, Criminal Procedure Code, are applicable to cure the defect

Lastly, it was submitted that the 6 items of alleged cheating were combined together in one charge and the conviction of the appellant is therefore illegal.

1. I L R. (1906) 30 Bom 205 305 I L R (1918) 42 Bom 373
2. (1918) L R. 45 I A. 29 (1918) 34 M L J

There is no merit in this argument because the lower Courts have found that all the six items of cheating were part and parcel of one transaction and the trial of the appellant on a single charge was therefore permissible under section 239, Criminal Procedure Code.

For the reasons expressed we hold that the decision of the High Court should be affirmed and this appeal should be dismissed.

V K. *Appeal dismissed.*

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THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction )

PRESENT :—K. N. WANCHOO, J. M. SHELAT AND G. K. MITTER, JJ.

Ammathayi *alias* Perumalakkal and another .. *Appellants**

*v.*

Kumaresan *alias* Balakrishnan and others . *Respondents.*

*Evidence Act (I of 1872), section 112—Scope and effect*

*Hindu Law—Joint family—Gift—Power to gift away ancestral movable or immovable properties—Limitations—Gift by husband to wife of immovable ancestral property—Validity—If becomes valid if made to carry out wishes of the father of the husband—Father-in-law's power to gift ancestral immovable property to daughter-in-law.*

Section 112 of the Evidence Act raises *inter alia* a conclusive presumption that a child born during the continuance of a valid marriage between his mother and any man is the legitimate son of that man, and this conclusive presumption can only be rebutted if it is shown that the parties to the marriage had no access to each other at any time when he could have been begotten

In the instant case the wife was only living one furlong away in her father's house from where the husband was living The evidence produced falls short of proving that the husband, though living separately, had no access to her at any time when the plaintiff could have been begotten by her.

Hindu law on the question of gifts of ancestral property is well-settled So far as movable ancestral property is concerned, a gift out of affection may be made to a wife, to a daughter and even to a son, provided the gift is within reasonable limits A gift for example of the whole or almost the whole of the ancestral movable property cannot be upheld as a gift through affection But so far as immovable ancestral property is concerned, the power of gift is much more circumscribed than in the case of movable ancestral property A Hindu father or any other managing member has power to make a gift of ancestral immovable property within reasonable limits for " pious purposes " Now what is generally understood by pious purposes is gift for charitable and/or religious purposes But the Supreme Court in *Kamala Devi* v *Bachu Lal*, (1957) S C J 321 (1957) 1 An W R (S C ) 66 . (1957) 1 M L J (S C ) 66 (1957) S C R 452, has extended the managing of pious purposes to cases where a Hindu father makes a gift within reasonable limits of immovable ancestral property to his daughter in fulfilment of an ante-nuptial promise made on the occasion of the settlement of the terms of her marriage and the same can also be done by the mother in case the father is dead Later in *Guramma* v *Malappa*, (1964) 4 S C R 497, it was held that the right to make such a gift is not confined to the marriage occasion alone but can be made at any time

But a gift by a husband to his wife of immovable ancestral property made out of love and affection would be invalid, for no such gift is permitted under the Hindu law Such a gift will not become valid merely because in making the gift the husband was merely carrying out the wishes of his father. Even the father-in-law if he had desired to make such a gift at the time of the marriage of his daughter-in-law would not be competent to do so It is no doubt true that gifts made in token of love by the father-in-law to a daughter-in-law are permitted and become her *stridhan* property But that does not mean that a father-in-law is entitled to make a gift of ancestral immovable property to a daughter-in-law so as to convert it into her *stridhan* Generally such gifts are of movable property. But even if gifts of immovable property in such circumstances are possible, the two provisions must be read harmoniously If therefore Hindu law does not permit a father-in-law to make a gift of ancestral immovable property to his daughter-in-law, he cannot make such a gift for the purpose of *stridhan*. Further if gifts by the father-in-law to the daughter-in-law which become *stridhan* include gifts of immovable property, they can only refer to such immovable property as is not ancestral immovable

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* C A. No 618 of 1964 15th September, 1966.

property, for that is the only way in which the two provisions can be reconciled. There is therefore no warrant in Hindu law in support of the proposition that a father-in-law can make a gift of ancestral immovable property to his daughter-in-law

Appeal from the Judgment and Decree dated the 29th November, 1960, of the Madras High Court in Appeal Suit No. 207 of 1957.

*Sarjoo Prasad,* Senior Advocate (*M S. Narasimhan,* Advocate, with him), for Appellants.

*S. V. Gupte,* Solicitor-General of India (*A G. Ratnaparkhi,* Advocate, with him), for Respondents Nos. 1 and 2

*R. Ganapathy Iyer,* Advocate, for Respondent No. 3.

The Judgment of the Court was delivered by

*Wanchoo, J* :—This is an appeal on a certificate granted by the Madras High Court and arises in the following circumstances One Rangaswami Chettiar was a man of considerable property and used to live in Poolathur village. He first married one Bappani and had a son by her. But both the son and Bappani died. He therefore married Ammathayee, who was defendant No. 2 in the suit and is appellant No 1 before us He had a son and two daughters by her. But unfortunately all the three children died. Thereafter Rangaswami Chettiar married Lakshmiammal in 1943 She was the first defendant in the suit. It appears that no child was born to Lakshmiammal for about three years and therefore Rangaswami Chettiar married a fourth time His fourth wife was the sister of his second wife named Supputhayee In February, 1949 Lakshmiammal gave birth to a son. There is dispute as to the question whether Lakshmiammal had left her husband about 1945 or so because of frequent quarrels between the two. Anyhow the fourth wife had also no children In June, 1953, Rangaswami Chettiar fell ill He was first treated as an out-patient in Batlagundu hospital and later admitted as an in-patient On 16th June, 1953, he executed a registered deed of gift in favour of his second wife Ammathayee of certain immovable joint family property. Lakshmiammal when she came to know of this gift published a notice in a newspaper accusing the second and fourth wife of trying to deprive her and her minor son of their due share in the joint family property by having the gift deed executed and claimed that the gift deed was not valid On 4th September, 1953, Rangaswami Chettiar sent a notice in reply to the notice published by Lakshmiammal In that notice Rangaswami Chettiar accused Lakshmiammal of having left him a year and a half after the marriage after quarrelling with him. He also accused her of living a life of promiscuity thereafter. Finally he said in the notice that the son born to Lakshmiammal in February, 1949 was not his son Lakshmiammal gave reply to this notice of Rangaswami Chettiar on 15th September, 1953, in which she maintained that the child was Rangaswami Chettiar's. She also claimed that Rangaswami Chettiar's mind had been poisoned against her by his two other wives She denied that she had any connection with any other man besides Rangaswami Chettiar. In December, 1953 Rangaswami Chettiar died.

The present suit was filed a year later on 3rd January, 1955, on behalf of the minor son. He claimed half share in the joint family properties left by Rangaswami Chettiar To this suit the three widows who between them have half share were defendants Nos. 1, 2 and 3 Three other defendants were made parties to the suit to whom we shall refer later as they are not concerned with the main controversy between the plaintiff and the two step-mothers (*i e*, second and third defendants).

The main defence of the two step-mothers, who are now appellants before us, was that the plaintiff though born to Lakshmiammal was not the son of Rangaswami Chettiar and was therefore not entitled to any share in his properties Further Ammathayee pleaded that the gift deed in her favour was valid and that even if the plaintiff was the son of Rangaswami Chettiar he would be entitled to half share of the properties other than those gifted to her by Rangaswami Chettiar before his death. There were other issues in the suit, but we are not concerned with them in the present appeal.

On the main question, namely, whether the plaintiff was the son of Rangaswami Chettiar, the trial Court found in his favour Further on the question whether the gift deed in favour of Ammathayee was valid, the trial Court was of opinion that it was not competent for Rangaswami Chettiar to make a gift of immovable joint family property to his wife The trial Court therefore held the gift to be invalid and gave the plaintiff a decree for his half share in the property left by Rangaswami Chettiar, including the properties gifted to Ammathayee before his death

Thereupon the two step-mothers went in appeal along with two other defendants and contested the finding of the trial Court on both these issues. The High Court however upheld both the findings. On a consideration of the evidence, the High Court came to the conclusion that the heavy burden that lay on those who disputed the paternity of the plaintiff-respondent in view of section 112 of the Indian Evidence Act (I of 1872), had not been discharged in this case and it had not been proved that Rangaswami Chettiar had no access to Lakshmiammal on or about the time when the plaintiff-respondent could have been conceived On the question of the gift deed, the High Court held that Hindu law did not permit a husband to gift joint family immovable property to his wife in the circumstances in which the gift was made in this case. The High Court therefore dismissed the appeal so far as the step-mothers of the plaintiff-respondent were concerned The High Court however allowed the appeal of defendants Nos. 4 and 5 who were the brothers of the two step-mothers of the plaintiff-respondent and set aside the decree of the trial Court with respect to them by which they were made accountable There was also a cross-objection before the High Court with respect to certain properties which were in the possession of the sixth defendant That cross-objection was dismissed on the ground that the plaintiff-respondent had failed to prove that those properties were joint family properties left by Rangaswami Chettiar. Thereafter the two widows who are the appellants before us applied for and obtained a certificate to appeal to this Court as the decree of the High Court was that of variance, and that is how the matter has come before us.

The two main questions which have been argued before us are—

(i) whether the plaintiff-respondent was the son of Rangaswami Chettiar, and

(ii) whether the deed of gift was valid.

So far as the first question is concerned, there is a concurrent finding of the trial Court as well as of the High Court that the plaintiff-respondent is the son of Rangaswami Chettiar. Ordinarily therefore this Court would not interfere with this concurrent finding of fact. But it is urged that the High Court did not accept the evidence on this point in the same measure as the trial Court did, and that there are circumstances which should have led the High Court (when it did not accept the evidence in full) to hold that the plaintiff-respondent was not the son of Rangaswami Chettiar It is also urged that the High Court was in error in holding on the basis of section 112 of the Evidence Act that the paternity of the plaintiff-respondent had been proved. We are of opinion that there is no force in this contention. The main evidence on behalf of the plaintiff-respondent was that of his mother, Lakshmiammal. On the other hand the appellants relied on the notice sent by Rangaswami Chettiar to Lakshmiammal denying the paternity of the plaintiff-respondent, and it is urged that a notice of this kind is very strong evidence rebutting the presumption that the plaintiff-respondent is the son of Rangaswami Chettiar, and this is particularly so in the present case because Rangaswami Chettiar was keen on having a son and had married four times for that purpose. He would not have denied the paternity of the son born to his third wife in the circumstances if that was true The High Court was not oblivious of the force of these circumstances But the evidence of Lakshmiammal was that she never quarrelled with her husband and that her husband married again because she did not give birth to a child for about three years, and the fourth marriage of Rangaswami Chettiar took place with her consent. She also said that she had not

left the house of Rangaswami Chettiar and that the plaintiff-respondent was Rangaswami Chettiar's son. She further said that her co-wives became jealous after the birth of the plaintiff-respondent to her and that is why they influenced Rangaswami Chettiar against her This evidence was relied upon by the trial Court and the High Court has not disbelieved it It is also in evidence that Lakshmiammal was living in her father's house in the same village as Rangaswami Chettiar, even according to the appellants' witnesses and that Lakshmiammal's father's house was only a furlong away from Rangaswami Chettiar's house It was in these circumstances that the High Court had to consider the question whether the heavy burden which lies on a person denying the paternity of a child born during wedlock had been discharged. It is true that Rangaswami Chettiar had given the notice to Lakshmiammal in which he denied the paternity of the plaintiff respondent, but that notice stands in no better position than would have been the statement of Rangaswami Chettiar even if he was alive when this suit was fought out in the trial Court. Section 112 is in these terms—

> "The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten "

It raises *inter alia* a conclusive presumption that a child born during the continuance of a valid marriage between his mother and any man is the legitimate son of that man, and this conclusive presumption can only be rebutted if it is shown that the parties to the marriage had no access to each other at any time when he could have been begotten. The appellants therefore had to prove, as Rangaswami Chettiar would have had to prove even if he was alive when the suit was fought out in the trial Court, that he had no access to Lakshmiammal at any time when the plaintiff-respondent could have been begotten. We have already said that even according to the appellants Lakshmiammal was only living one furlong away in her father's house from where Rangaswami Chettiar was living. In these circumstances the evidence produced in the present suit falls far short of proving that Rangaswami Chettiar had no access to Lakshmiammal at any time when the plaintiff-respondent could have been begotten We have therefore no hesitation in agreeing with the High Court, particularly taking into account the evidence of Lakshmiammal which has not been disbelieved by the High Court, that the appellants had completely failed to prove non-access of Rangaswami Chettiar to Lakshmiammal, at any time when the plaintiff-respondent could have been begotten. In these circumstances there is no reason for us to interfere with the concurrent finding of fact as to the paternity of the plaintiff-respondent and we hold that he is the legitimate son of Rangaswami Chettiar.

This brings us to the question of the validity of the gift deed in favour of Ammathayee. The gift deed begins with the following recital.

> "As you happened to be my second wife and in accordance with the promise made to you by my father, K K Ramasami Chettiar at the time of my marriage with you, and according to the directions given to me also to execute a document in your favour and also in consideration of the affection you are having for me, and your obedient nature"

and then follow the words making the gift of certain immovable properties in her favour. According to the donee-appellant, the value of this immovable property was about one-tenth of the entire property left by Rangaswami Chettiar The argument on behalf of the donee-appellant is that the gift was valid as it was of a reasonable portion of this immovable property, firstly, because it was made by a husband in favour of a wife out of love and affection, and secondly, because it was made by her husband to carry out the pious obligation that lay on him to fulfil the wishes of his father to make some provision for Ammathayee, which his father had indicated at the time of her marriage.

Hindu law on the question of gifts of ancestral property is well-settled. So far as movable ancestral property is concerned, a gift out of affection may be made to a wife, to a daughter and even to a son, provided the gift is within reasonable

limits. A gift for example of the whole or almost the whole of the ancestral movable property cannot be upheld as a gift through affection: (*see* Mulla's Hindu Law, 13th Edition, page 252, para. 225) But so far as immovable ancestral property is concerned, the power of gift is much more circumscribed than in the case of movable ancestral property. A Hindu father or any other managing member has power to make a gift of ancestral immovable property within reasonable limits for "pious purposes". (*see* Mulla's Hindu Law, 13th Edition, para 226, page 252). Now what is generally understood by "pious purposes" is gift for charitable and/or religious purposes. But this Court has extended the meaning of "pious purposes" to cases where a Hindu father makes a gift within reasonable limits of immovable ancestral property to his daughter in fulfilment of an ante-nuptial promise made on the occasion of the settlement of the terms of her marriage, and the same can also be done by the mother in case the father is dead. (see *Kamala Devi* v. *Bachu Lal Gupta*[1])

In *Guramma Bhratar Chanbassappa Deshmukh* v. *Malappa*[2], it was observed by this Court that

> "the Hindu law texts conferred a right upon a daughter or a sister, as the case may be, to have a share in the family property at the time of partition. The right was lost by efflux of time. But it became crystallized into a moral obligation The father or his representative can make a valid gift by way of reasonable provision for the maintenance of the daughter, regard being had to the financial and other relevant circumstances of the family By custom or by convenience, such gifts are made at the time of marriage, but the right of the father or his representative to make such a gift is not confined to the marriage occasion Marriage is only a customary occasion for such a gift But the moral obligation can be discharged at any time, either during the life time of the father or thereafter"

But we have not been referred to a single case where a gift by a husband to his wife of immovable ancestral property, if made, has been upheld We see no reason to extend the scope of the words "pious purposes" beyond what has already been done in the two decisions of this Court to which reference has been made The contention of the donee-appellant that the gift in her favour by her husband of ancestral immovable property made out of affection should be upheld must therefore fail, for no such gift is permitted under Hindu law insofar as immovable ancestral property is concerned.

As to the contention that Rangaswami Chettiar was merely carrying out his father's wishes when he made this gift in favour of his wife and that act of his was a matter of pious obligation laid on him by his father, we are of opinion that no gift of ancestral immovable property can be made on such a ground Even the father-in-law, if he had desired to make a gift at the time of the marriage of his daughter-in-law, would not be competent to do so insofar as immovable ancestral property is concerned No case in support of the proposition that a father-in-law can make a gift of ancestral immovable property in favour of his daughter-in-law at the time of her marriage has been cited. There is in our opinion no authority to support such a proposition in Hindu law. As already observed, a Hindu father or any other managing member has power to make a gift within reasonable limits of ancestral immovable property for pious purposes, and we cannot see how a gift by the father-in-law to the daughter-in-law at the time of marriage can by any stretch of reasoning be called a pious purpose, whatever may be the position of a gift by the father or his representative to a daughter at the time of her marriage. One can understand such a gift being made to a daughter when she is leaving the family of her father As it is the duty of the father or his representative to marry the daughter, such a gift may be and has been held by this Court to be for a pious purpose But we see no pious purpose for such a gift by a father-in-law in favour of his daughter-in-law at the time of marriage As a matter of fact the daughter-in-law becomes a member of the family of her father-in-law after marriage and she would be entitled after marriage in her own right to the ancestral immovable property in certain circumstances, and clearly therefore her case stands on a very

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1. (1957) S C J 321 (1957) 1 An W R (S C) 66 . (1957) 1 M L J. (S C) 66 : (1957) S C R 452

2. (1964) 4 S.C R. 497.

different footing from the case of a daughter who is being married and to whom a reasonable gift of ancestral immovable property can be made as held by this Court.

Learned Counsel for the donee-appellant further refers to the fact that gifts made in token of love by her father-in-law to a daughter-in-law are permitted and become her *stridhan* property. That is so. But that does not mean that a father-in-law is entitled to make a gift of ancestral immovable property to a daughter-in-law so as to convert it into her *stridhan.* Generally such gifts are of moveable property. But even if gifts of immovable property in such circumstances are possible, the two provisions must be read harmoniously. If therefore Hindu law does not permit a father-in-law to make a gift of ancestral immovable property to his daughter-in-law, he cannot make such a gift for purposes of *stridhan.* Further if gifts by the father-in-law to the daughter-in-law which become *stridhan* include gifts of immovable property, they can only refer to such immovable property as is not ancestral immovable property, for that is the only way in which the two provisions can be reconciled. We have therefore no difficulty in holding that there is no warrant in Hindu law in support of the proposition that a father-in-law can make a gift of ancestral immovable property to a daughter-in-law at the time on her marriage If that is so, we cannot see how what the father-in-law himself could not do could be made into a pious obligation on the son as is claimed in this case, for that would be permitting indirectly what is not permitted under Hindu law directly. Further in any case gifts of ancestral immovable property can only be for pious purposes, and we doubt whether carrying out the directions of the father-in-law and making a gift in consequence can be said to be a gift for a pious purpose, specially when the father-in-law himself could not make such a gift. We are therefore of opinion that this gift cannot be upheld on the ground that Rangaswami Chettiar had merely carried out the wishes of his father indicated on the occasion of the marriage of Ammathayee.

The appeal therefore fails and is hereby dismissed with costs to the plaintiff-respondent.

Before we part with this appeal, we should like to refer briefly to the case of Natarajan Chettiar who was defendant No 6 in the trial Court and is respondent No. 3 before us. He was made a party with respect to certain properties in Schedule D to the plaint. His case was that the properties in Schedule D were not liable to be partitioned. This contention of his was upheld be the trial Court. That is why the decree does not provide for partition of D Schedule properties. It was therefore unnecessary for the appellants to make him a party to the present appeal unless the appellants claimed some relief against him. Learned Counsel for the appellants has stated that no relief is being claimed against Natarajan Chettiar, respondent No. 3. The appeal therefore must fail as against Natarajan Chettiar who will get his costs from the appellants but no hearing fee.

Further among the properties to be divided were a gold chain (item 6) and certain promissory notes (items Nos. 2 to 4) of Schedule B. The trial Court held that there was no proof that these items existed. In the decree however this has not been made quite clear. We therefore direct that the trial Court will correct the decree to bring it into line with its finding on these items.

V.K. *Appeal dismissed.*

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[END OF VOLUME (1967) 1 M.L.J. (S.C.)].